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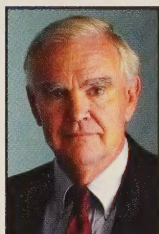
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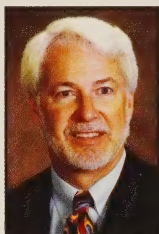
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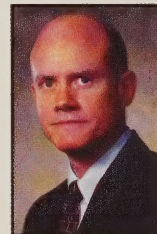
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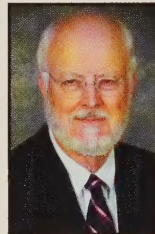
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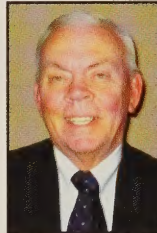
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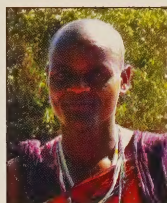
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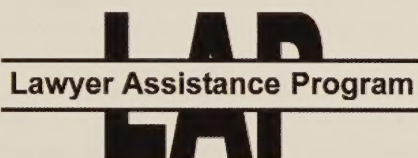
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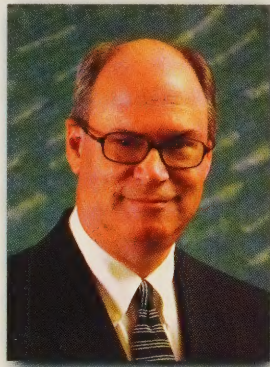


FOR THE ISSUES OF LIFE IN LAW

All the Dues That's Fit to Print

BY L. THOMAS LUNSFORD II

Over the years I have explored a great many compelling topics in this space. Who can forget my treatment of *pro hac vice* registration? And what about my take on reapportionment of the Bar Council? And, honestly, was there anyone who wasn't moved by the account of my involvement in the Duke lacrosse case? Of course, tastes vary, and everyone probably has his or her own particular favorite—one of my essays that they tend to read again and again, and quote from at important events like high school graduations and wedding rehearsal dinners. As you can imagine, I am frequently asked to name my favorite. That's extremely difficult. It's like being asked to identify a favorite child. To avoid having to make such a declaration, I generally respond categorically, naming a substantive genus of commentary rather than a single article. Interestingly, I don't always offer the same response. My preferences are seasonal. This time of year, I usually gravitate toward financial arcana, especially that hardy perennial: the State Bar's annual dues invoice. To be sure, it's something that has been exhaustively studied and written about in recent years. Indeed, my own contributions to the literature have been quite extensive. And yet, it seems that there is always something new to say—some aspect of the subject that inspires wonder and warrants scholarly exegesis. That being the case, I have chosen to revisit the subject yet again this year, to highlight what's new on the invoice, what's no longer on it, and what may yet be on it.



is a formidable, some may say daunting, document, chock-full of instructions, demands, information, explanation, and good vibes. As a graphic composition, it is a lyrical flight of font and fancy. As a piece of literature, it's something more than a limerick but less than a graphic novel. It is, in legal parlance, *sui generis*. It is, ultimately, a bill for 375 bucks.

What's new on it?

A dues increase. Please note that the total amount due is a composite figure, embracing not only the annual membership fee, but also the Supreme Court's assessment in support of the Client Security Fund (\$25, same as last year), and the legislature's judicial surcharge (\$50, same as always). Dues are only \$300. True enough, that amount embodies a \$35 increase over the amount charged last year, and the year before that, but it seems a fairly reasonable price to pay for the privilege of practicing law—and for a new headquarters building that is desperately needed, has been on the drawing board for the past year, and is sure to be a source of pride for the legal profession in our state for most of the next century. In that regard, please see the latest conceptual rendering that accompanies this article.

I hasten to say that the dues increase was ordered by your representatives on the council advisedly, and with a clear understanding that times are hard for a great many, and many great, lawyers in North Carolina. Although my introduction to this article is characteristically facetious, please know that I personally understand that this is, after all, no joking matter. Thirty-five dollars isn't much money, unless you're out of work, then it's quite significant. That notwithstanding, however, it seems clear that circumstances at the

moment are extraordinarily favorable to the building project that the increase is intended to finance. Construction costs are extremely depressed in this weak economy and outstanding contractors are aggressively competing for projects like ours. Interest rates are at historically low levels and our credit is impeccable. And, we've been able to negotiate a very favorable contract for design services with one of North Carolina's best architectural firms. The window of opportunity is wide open right now. Hesitation would be foolish and could be costly.

It is estimated that our building will cost \$14 million. It is assumed that approximately \$10 million will be borrowed, probably through the sale of tax-exempt bonds, and that the balance will be paid from the proceeds from the sale of the State Bar's current building, contributions (including \$500,000 already donated by the Board of Paralegal Certification on behalf of more than 4,500 certified paralegals across the state), and cash on hand. The \$35 increase in dues should generate sufficient cash next year, more than \$800,000, to pay the architects in full and the transaction costs associated with the financing. It should yield enough revenue going forward to handle the anticipated debt service from year to year until the obligation has been discharged.

Please understand that the building we're designing, though beautiful, will not be extravagant. It will, rather, be in every sense appropriate and appropriately economical. As has been previously noted in these pages, the site of the building, in the State Government Complex at the intersection of Blount and Edenton Streets, is being leased to the Bar by the State of North Carolina for 99 years for nominal consideration. A comparable site, if one could have been obtained, would likely have cost more than a million dollars. The 60,000 square foot building will be "green." Designed to attain LEED certifi-

The Invoice

A facsimile of the invoice appears at the end of this article. As you can readily see, it

cation, its negative impact upon the environment will be minimal, as will its operating cost. It will accommodate all of the State Bar's operations, including those that are currently carried on offsite at considerable cost, under a single, energy-efficient roof, and will have sufficient space to allow for decades of growth. (This extra capacity will surely be needed since the population of lawyers in North Carolina is expected to double within the next 20 years.) Not only will the building house the State Bar's staff, it will also contain courtrooms and meeting facilities sufficient to support the regular quarterly meetings of the council. Thousands of dollars that are currently paid to hotels to rent meeting rooms will be saved each year. Finally, it should be noted that the new building will also be the home of the North Carolina Board of Law Examiners. That agency, which has led a Bedouin-like existence in Raleigh since the mid-nineties, will be back where it belongs, in the bosom of the profession, and will share the cost and the many advantages of a well conceived and thoroughly modern build-

ing as our primary tenant.

A critical factor in controlling the cost of the project will be obtaining the most advantageous financing possible. Although our initial cost projections assumed the issuance of tax-exempt bonds pursuant to recently granted legislative authority, every reasonable alternative is being examined. Heck, we've even scrutinized a few unreasonable alternatives. I myself have in the past few months acquired enough familiarity with such things as Letters of Credit (LOCs), New Market Tax Credits (NMTCs), Charitable Remainder Annuity Trusts (CRATs), and Low Floaters (LOWFLOATERS) to go NUTs. Be that as it may, it seems likely that we are going to be able to borrow funds at lower rates than could ever have been imagined when the State Bar's leadership first envisioned the new building a couple of years ago.

Well, I know that some of you are growing impatient with all of this information about the new building. You started reading this article in good faith because you craved insight into the dues notice, and you are now wondering whether you'll ever

find out what happened to the questions about malpractice insurance. I apologize for the digression, but the building project really is the reason why dues are going up next year, and I thought you ought to know. Now, having said that, I believe you should also know that we're not counting on dues alone to make the building all that it should be. We anticipate that contributions from entities and individuals will be solicited through a charitable foundation next year. The details are as yet incomplete, but we hope to raise a significant amount to enhance the beauty and functionality of the building. As noted above, we're off to a good start thanks to the certified paralegals' incredibly generous contribution of a half million dollars.

An election. Three years ago the General Assembly imposed a \$50 surcharge on active members of the State Bar to support "public" financing of appellate judicial elections through the "Public Campaign Fund," and required the State Bar to collect the money for the Board of Elections. Earlier this year in an order resolving state court litigation concerning

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I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form 3526, September 2006 (Page 2 of 3)



the constitutionality of that tax, Judge Manning concluded that since a lawyer cannot be forced to contribute to the political campaign of someone he or she might not support, the lawyer must be allowed to elect whether his or her money will be used to support the Public Campaign Fund or will go exclusively to fund a statutorily prescribed "voter guide." On this year's dues notice, you will be afforded that choice, down toward the bottom of the first page. If you don't "opt out," your money can be used for any purpose authorized by N.C. Gen. Stat., Chapter 163, Article 22D (to fund either the Campaign Fund or the voter guide). If you do, all your money will go for the voter guide. If everyone pays, as they must to remain in good standing with the Bar, a total of \$1,187,250 will be raised, which could buy a lot of media advertising. However, if everyone elects to fund the voter guide, it will be one incredibly slick magazine.

What's not on it?

Malpractice insurance questions. In 2004, the State Bar started requiring lawyers in private practice to disclose whether they maintain professional liability insurance. The information has been solicited on the annual dues notice and published on the Bar's website for the benefit of consumers of legal services. From the very beginning, many people have had reservations about the value and reliability of the information. As the program was designed, there was no practical way to update the information. There was no information solicited as to the amount of coverage available. There was no way of

knowing whether there were any pending claims. There was no way of determining whether anybody was paying any attention at all. This year a subcommittee of the Program Evaluation Committee took a hard look at the program and decided that it was unnecessary and could possibly be doing more harm than good. An amendment to the State Bar's rules that would eliminate the requirement is now being proposed, and is published for comment elsewhere in this issue of the *Journal*. In anticipation of the requirement's abolition, the insurance questions have been deleted from the dues notice for 2010. If either the council or the Supreme Court chooses not to approve that action, then the information will be solicited in separate correspondence with the membership sometime next year. In the meantime, enjoy not having to answer the questions.

What's not yet on it?

IOLTA Comparability. Also published for comment in this issue of the *Journal* is a proposed amendment to the IOLTA rules that would require each lawyer with a trust account to maintain that trust account only at a bank that will agree to pay interest on it that is "comparable" to the interest paid by that bank on similar accounts. If adopted by the council and approved by the Supreme Court, this rule is expected to generate much additional revenue that can be used by IOLTA to fund grants dramatically increasing access to justice in North Carolina. More importantly, at least for the purposes of this article, it will also require a small change in the IOLTA certification on next year's dues notice. Lawyers will be asked to certify not only that they maintain their trust accounts as IOLTA accounts, but also that those accounts are maintained in "eligible" banks—that is to say, banks that agree to pay "comparable" interest.

Demographic questions. It may surprise you to learn that I don't know how many female lawyers there are in our state. The State Bar also doesn't have a clue as to how many of you are, or consider yourselves to be, members of distinct minority groups. As far as I know, we've never had a need for the information. Still, a great many people are curious. A subcommittee of the Issues Committee is presently studying whether it would be advisable for the Bar to ask, but not require, lawyers to disclose certain demographic information about themselves such as gender, race and ethnicity. The North Carolina Bar Association has asked that this be done in order that the information, which would become public under the terms of the Public Records Act, might be made available to assist it in evaluating the effectiveness of its diversity programs. Our research indicates that there are other mandatory state bars that capture and maintain such information for a variety of reasons. Maybe we should, too. If the subcommittee and the council conclude that we have a "need to know," our dues notice will, in all likelihood, include a few more questions next year.

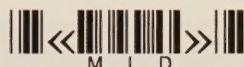
What's the point?

The State Bar's invoice is a magnificent interactive composition that ought not be taken for granted. Like the basketball team in *Hoosiers*, before Jimmy Chitwood decided to play, it demands your respect—and earnestly solicits your kind attention. It has a nostalgic quality, a tangibility that will be missed and mourned in coming years as the seasonal greeting it embodies gives way, inevitably, to the cheaper and less personal intrusion of an e-mailed dues statement. I know I'm preaching to the choir on this subject. The people who have the interest and inclination to slog to the end of one of my articles are the very people who can't wait to find the State Bar's dues notice in their mailboxes every December. It's a small group, only slightly larger than the number of surviving World War I veterans, and is getting smaller with each essay I write. So, before you're all gone, allow me to say that even if no one else appreciates you, I do, and it is to you that this year's dues notice is dedicated. ■

L. Thomas Lunsford II is the executive director of the North Carolina State Bar.



2010 MEMBERSHIP FEES
THE NORTH CAROLINA STATE BAR



Jane A. Lawyer

MANDATORY MEMBERSHIP FEES:

MEMBERSHIP DUES.....\$300.00
CSF ASSESSMENT*.....\$25.00
JUDICIAL SURCHARGE**.....\$50.00
TOTAL DUE JANUARY 1, 2010.....\$375.00

Membership fees are delinquent if not **postmarked** by
June 30, 2010.

**Payments rendered after June 30, 2010 must
include a \$30.00 late fee.**

A fee of \$20.00 will be charged for any check that is not
honored.

**PAY ONLINE WITH VISA/MASTERCARD AT
WWW.NCBAR.GOV**

Or mail payment, with this COMPLETED
NOTICE:

The North Carolina State Bar
Membership Department
P.O. Box 26088
Raleigh, N.C. 27611

**Please do not staple your check to the
notice**



**ALL ACTIVE LAWYERS ARE REQUIRED TO MAKE THEIR
MANDATORY IOLTA CERTIFICATION BELOW**



FOR FIRMS OR AGENCIES: When submitting one check for all lawyers, you must still return a dues notice for EACH LAWYER, to insure proper processing. However, you may attach a cover letter (in lieu of marking each notice) making the mandatory IOLTA certification and judicial surcharge designation for all lawyers in the firm or agency if the responses are the same for all lawyers.

MANDATORY IOLTA CERTIFICATION:

Pursuant to 27 N.C.A.C. 1D, Rule .1318, lawyers must certify annually that all general client trust accounts maintained by the lawyer/law firm for North Carolina clients are NC IOLTA accounts. To report new or closed NC IOLTA accounts or employment changes, please submit a NC IOLTA Status Update Form which can be found at www.ncbar.gov/PDFs/21.pdf.

A. ☐ I certify that all of my firm's general trust accounts for North Carolina client funds are established as North Carolina IOLTA Accounts.

OR

B. ☐ I certify that my IOLTA status is exempt for one or more of the following reasons:

- I am not in private practice.
- I am in private practice; however, my law firm does not maintain general client trust accounts for NC client funds.
- I am not practicing in North Carolina and do not handle North Carolina client funds.

****JUDICIAL SURCHARGE:**

The General Assembly imposed the judicial surcharge to support the NC Public Campaign Fund (G.S. Chap. 163, Art. 22D), which funds a Voter Guide and provides campaign financing for eligible candidates for appellate judicial office. The State Bar is required to collect the surcharge and deliver it to the Board of Elections. (G.S. 84-34). By checking this box, you can designate that your surcharge may be spent only on the Voter Guide. ☐

*For 2010, the North Carolina Supreme Court has ordered a mandatory assessment of \$25.00 to support the Client Security Fund (CSF).

An Interview with New President Barbara (Bonnie) B. Weyher

Q: What can you tell us about your roots?

Although I grew up in New York City, my family has strong roots in North Carolina. I graduated from the University of North Carolina at Chapel Hill with a BA in Journalism and then attended law school there as well, graduating in 1977. After practicing law in New York for two years, I returned to North Carolina where I have been in private practice ever since.

Q: Tell us about your family.

My husband, Dan McLamb, and I have four boys. Brad (30) is an accountant with Ernst & Young in Atlanta and will likely be transferred soon to Chicago. Will (27) lives in Raleigh and works for the Summit Hospitality Group. Our twins (20) are sophomores in college. Alex attends Davidson College, and Chris attends Washington University in St. Louis. Both want to go to law school.

Q: When and how did you decide to become a lawyer?

As strange as it seems, I did not decide to practice law until well into my first year in law school. As an undergraduate, I studied journalism with the intent of pursuing that as a career. One of my professors suggested law school as a way to have a more specialized career in journalism. By the end of my first year at UNC Law, I was certain I wanted to be a lawyer.

Q: What's it like to practice with your husband?

Wonderful. Dan and I have practiced together during our entire 22-year marriage. I cannot imagine being in a practice without him.

Q: If you had not chosen to become a lawyer, what do you think you would have done for a living?

Since I studied journalism in college, I believe I would have pursued a career as a journalist. I like to write.

Growing up, I wanted to be a figure skater. My mother was quite an accomplished skater

in her youth. Unfortunately, despite all the lessons, I just did not have her talent.

Q: During your tenure on the council, women have always been underrepresented. Why is that? Why is it important that more women and minority lawyers be elected? What are you planning to do to address this situation?

For the 11 years I have been on the State Bar Council, the number of women and minority lawyers who have run for the council has been low. Currently, of the 59 elected councilors and four officers, nine are women and two are African-American. I am not sure of the reason for the low numbers. I have wondered whether it is because of the manner in which we elect councilors or whether it is because of the large percentage of women and minority lawyers who are in solo or small practices and find it difficult to devote the time involved. To some extent, it may be due to the lack of information about State Bar Council positions.

I believe that in order to maintain and increase the public trust as we look to the future, we need to encourage and attain broad participation in the regulation of our profession. With broader representation, we will not only increase confidence in our process, but we will also have the benefit of additional backgrounds and experiences to help address the difficult challenges our profession will certainly face in the coming years.

Q: You've called for the creation of a new committee to make recommendations on means to encourage wider participation in the State Bar. Where do you see this committee going?

Former State Bar Presidents Ann Reed and Judge Calvin Murphy have generously agreed to co-chair an outreach committee charged with studying and recommending means to encourage wider participation in the North Carolina State Bar by minority and female lawyers.



Fortunately, there are a number of other mandatory bars in the country that have already undertaken similar initiatives, so our committee will not need to start from scratch but will have the benefit of their experiences. Some of the options I will ask the committee to consider are 1) informational outreach efforts to women and minority bar organizations on the work of the State Bar; 2) the use of at-large council seats; 3) wider publication of openings in council and board positions; 4) the development of internship programs; and 5) the identification of and solution to potential obstacles which may discourage minority and women lawyers from running. At the Southern Conference of Bar Presidents meeting this fall, I had the opportunity to talk with a number of leaders of mandatory bars in the Southeast who reported to me positive progress from these types of efforts. I hope that we will be able to experience the same type of progress.

Q: You've been an officer during the past two years, first as vice-president and then as president-elect. What has that been like? Does the president generally call the shots unilaterally,

or does he/she seek consensus among all the officers before taking action?

We definitely work by consensus. Former President Hank Hankins once told me that substantive change takes more than one presidential term to accomplish and that it is, therefore, critical for State Bar officers to work together toward common goals. This coming year we hope to complete the goals of immediate Past-President John McMillan, including comparability for IOLTA accounts, the adoption of Rule 6.1, and the work of the Program Evaluation Committee, which is reviewing State Bar programs to determine whether they are operating as intended and whether improvements should be made.

Tony diSanti, our current president-elect, and I have talked about my goal of increasing the number of women and minority lawyers on the State Bar Council. We have also discussed this with incoming Vice-President Jim Fox. We all know that it will take longer than one year to begin to see results. Tony and Jim are extremely supportive and are prepared to carry the initiative forward after I am gone. Continuity is critical.

Q: You live in a large city and practice with a fairly large firm. Do you think you can understand and empathize with those lawyers who live and work in rural areas of the state?

One of the greatest aspects of serving on the State Bar Council is the opportunity to work and interact with lawyers from all over the state, including small towns and rural areas. This creates great balance in the council. Lawyers from metropolitan areas learn to understand and appreciate the issues facing lawyers in small towns and vice versa. I believe we all need to be sensitive to the fact that issues and views can be different, district to district.

Q: In your opinion does it make sense for lawyers to be regulating themselves? Do we deserve the public's trust?

Yes. Self-regulation makes sense provided that we understand and appreciate that it is a privilege and not a right. With a privilege comes obligation. The State Bar exists not to promote lawyer protectionism but to protect the public. As long as we never lose sight of that duty, we will maintain the public's trust.

Q: You served on the State Bar's Grievance Committee for many years and ultimately was its chair. What do you think about the disciplinary system? Is it working? Are we doing a good job? Where can we improve?

Katherine Jean, our general counsel, and her deputy counsel, investigators, and parale-



With her husband and law partner, Dan McLamb, looking on, Barbara (Bonnie) B. Weyher is sworn in as president of the North Carolina State Bar by Chief Justice Sarah Parker.

gals, do an outstanding job. Not only are they zealous advocates, they are also true professionals in every sense. We ask so much of them, and they deliver.

In 2007 I was appointed by then President Steve Michael to chair a committee to review the disciplinary system to make sure it was working as efficiently, promptly, and fairly as possible. At the end of 2007, the committee made a number of recommendations which I think have significantly improved what was already a good system. We still have some work to do, particularly in the area of technology.

Q: Can you tell us where we are in regard to the planning for the State Bar's new headquarters? Do we know how big it's going to be and what it's going to look like? Do we know when it will be built? And how much it will cost?

In December 2008, the Council of State voted to permit the state to enter into a 99-year lease agreement with the State Bar on a lot on the corner of Edenton Street and Blount Street, which is within the state government complex. The cost of the lease to the State Bar will be \$1.00. This past summer, the State Bar entered into a contract with Calloway, Johnson, Moore & West, PA, a Winston-Salem architectural firm, for the design of the building. The preliminary design appears on page 8 of this edition of the State Bar *Journal*. The plans call for a four-story, 60,000-square-foot building, although some of that space will not be immediately programmed but reserved for future growth. The projected cost is \$14 million. We anticipate breaking ground by the end of 2010,

with expected completion in mid-2012.

Q: How can you justify a dues increase at a time when so many North Carolina's lawyers are out of work or are underemployed?

Despite the current financial downturn, our bar continues to grow. We have had, and are continuing to experience, a significant increase in the number of attorneys licensed to practice in North Carolina, including lawyers coming from other states as well as from our seven in-state law schools, two of which just graduated their first classes this past spring. A record number of candidates took the bar exam this summer. Our projections show our bar doubling in size in the next 20 years. As the bar grows, the demands on our staff increase in all areas, including grievance complaints, fee dispute mediations, and ethics opinions, just to name a few.

The State Bar is completely out of space in its current building on Fayetteville Street, despite the fact that the Board of Law Examiners and LAP program are now being housed in other rental space in downtown Raleigh. This growth requires the Bar to move to new headquarters. We are told that it is a very favorable time to build, with construction costs lower than they have been in recent years, and we want to move quickly in order to take advantage of those lower costs. The lower construction costs, coupled with a lot at a nominal lease cost, will allow us to achieve considerable savings.

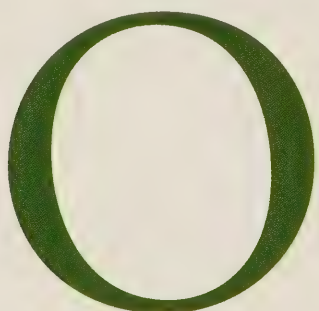
The new building is being designed to meet

CONTINUED ON PAGE 39

Access to Civil Justice in North Carolina

BY GENE R. NICHOL

The following submission is an opinion piece and the opinions expressed by the author are not necessarily those of the North Carolina State Bar. If you would like to submit an article expressing your viewpoint, please send an inquiry to the publisher.



ne could be honest-

ly heartened, even

proud, of the North

Carolina legal com-

munity's effort, over the last four years, in the cause of equal justice. I am.

Chief Justice I. Beverly Lake established the North Carolina Equal Justice Commission in December 2005. His successor, Sarah Parker, has carried the commission's work forward with enthusiasm. A report, outlining the crush of unmet need, was drafted and completed in 2008.¹ It included an array of thoughtful recommendations designed to narrow the gap between our aspirations and practice. The North Carolina Bar Association, responding to the passionate leadership of Janet Ward Black, established its award-winning 4ALL program, expanding the delivery of pro bono legal advice and services.² The NC State Bar implemented a comprehensive mandatory IOLTA program.³ The General Assembly helped with modest state increases earmarked to support access to civil justice. Others steps, in the academy, the bar, and on the bench, have followed. We have not, in short, been

sitting on our hands.

Still, our story remains a familiar and worrisome one. Over 80% of the legal need of the poor and near poor in North Carolina, a cohort of at least three million Tar Heels, is unmet. Almost 15% of us live in stark poverty—a fifth of our state's kids. A full third of North Carolina households have combined incomes of under \$25,000 a year.⁴ Legal Aid of North Carolina turns away eight of ten actionable claims because they can't meet the demand. Many times that number never seek services in the first place. The poor are typically left unrepresented on the most compelling issues of life—divorce, child custody, domestic violence, housing, sustenance, health care, education, and subsistence services. As the ABA has docu-



mented, huge numbers of Americans "lose their families, their houses, their livelihoods, and like fundamental interests, as a result of the want of counsel."⁵ And, of course, in the past 20 months, the harsh economic tide has hit us particularly hard. We've experienced, unsurprisingly, a crisis in home foreclosures. Our rates of unemployment and the uninsured have risen to among the highest in the nation. Reports indicate that "growing numbers of poor people swamp legal aid offices."⁶ We carve "equal justice under law" on our court-

house walls, but the legal system we actually operate is powerfully, diametrically, and fundamentally at odds with what we say we believe. And, all told, we are likely only losing ground.

My purpose in this brief essay is to explore one corner of our response to the embarrassment of massively unequal access to justice—the decisions and obligations of our courts. It is true, no doubt, that the effective removal of the poor and near-poor from our civil adjudication—this flight from fairness—is the concern and responsibility of many. Lawyers, bar associations, law schools, faculties, legislators, citizens, activists, governors, and more, play their parts. But judges—state and federal—shoulder a singular and defining role in creating, maintaining, and assuring open, effective, and meaningful access to the system of justice they administer. They determine, in actual and concrete ways, the measure of our constitutionally commanded notion of fairness—the "process" "due" in a regime of equal citizenship and dignity. They put flesh on the unfolding right to participate and be heard—without which a state's binding conflict resolution processes cannot be justified. In short, it is "uniquely the province of the judicial branch"⁷ to gauge and ensure the essential fairness and integrity of its proceedings.

On this front, the constitutional command of meaningful access, North Carolina courts have behaved like almost all of their state and national colleagues. Sadly, that's not saying a lot. It's not saying enough. I'll try briefly to explain.

In a series of decisions from the 1950s, 60s, 70s, and early 80s, the United States Supreme Court recognized the growing tension between its burgeoning due process and equal protection mandates and the frequent *de facto* [and sometimes *de jure*] exclusion of the poor from the effective use of the civil justice system—procedures which meant that those unable to pay various fees, or purchase transcripts, or post expensive bonds, or, occasionally, afford counsel, could not be readily reconciled with either rights of meaningful participation or the equal citizenship of the impoverished. As a result, modest steps were taken, under the due process and equal protection clauses, to ensure more effective access to those unable to bear the costs of litigation.⁸

These developing patterns, though, were significantly curbed by the Burger Court in the mid-70s. They were then brought to an unceremonious halt a few years later in a case from North Carolina, *Lassiter v. Dept. of Social*



Leonard T. Jernigan, Jr., attorney and adjunct professor of law, is pleased to announce that his 2009 supplement to Jernigan's *North Carolina Workers' Compensation: Law and Practice, with Forms* (4th edition) is now available from West, a Thomson Reuters business (1-800-344-5009).

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*Services of Durham, NC.*⁹ There, a closely-divided Court rejected an indigent's request for appointed counsel in an action brought by the state to terminate parental rights. Though conceding that the termination could "overwhelm an uncounseled parent," and that the private interests at stake were crucial, the Court announced the creation of a presumption against the recognition of a right to counsel if no loss of personal liberty is threatened. And *Lassiter's* presumption, in the succeeding three decades, has proven to be a potent one. Except for a small distinctive category of parental or reproductive cases, *Lassiter* deconstitutionalized the question of access to counsel in civil disputes.¹⁰

State courts, of course, have not been relegated, helplessly, to follow *Lassiter's* closed doors and knowing exclusion. *Lassiter* outlines only the floor demanded by the justices' tepid reading of the due process clause. States are free to do their own work—taking greater turns toward realism in enforcing their own constitutional provisions. If state judges are unsatisfied with standards that result in the marginalization of huge classes of litigants, they are given broader reign to actually

demand meaningful access. But, broadly speaking, they have not done so.

States have, perhaps ironically, reacted strongly to the facts of *Lassiter*. A majority has moved, either by statute or state constitutional determination, to require counsel in termination or dependency and neglect proceedings¹¹—though *Lassiter* didn't demand it. The reports are replete, as well, with cases exploring analogous parental or privacy-related interests. And decisions, unsurprisingly, give credence to actions—certain prisoner cases, contempt disputes, and civil commitment cases—that may threaten physical liberty.¹² What they haven't done, however, is apply searching scrutiny to the tension that occurs in the broad array of civil cases when indigents are denied meaningful access to a hearing because they can't afford a lawyer.

North Carolina's path is much the same. Though we grant counsel in a narrow array of *Lassiter*-like cases demanded by statute,¹³ we have repeatedly denied, without serious scrutiny, claims to counsel in civil cases under the demands of due process and equal protection.¹⁴ Unlike some states, we have refused to embrace a broader requirement for counsel

under our own state constitution than the federal courts demand.¹⁵ As a result, the "age old problem" of "providing equal justice for rich and poor, weak and powerful alike"¹⁶ has been removed from our constitutional agenda.

Our passivity leads to a bevy of fundamental problems.

The first is the most obvious one—huge numbers of poor and near poor North Carolinians are, in effect, turned away from the state adjudication system designed to resolve their legal disputes. What we characterize as "equal justice under law" is riddled with a massive exception, an undermining asterisk. Litigants, or potential ones, lose their effective ability to assert or protect various legal interests. The wounds can be tragic. We literally leave millions unrepresented—recognizing that the consequences may be more far-reaching, more devastating, and more permanent than many categories of criminal cases for which counsel is appointed. We recognize it, but then we put the lesson from our minds. We assume that near-total economic exclusion from a system of justice can be squared with fairness. It can't.

Second, in other circumstances, we've said so. As early as the 1930s, in the criminal context, the US Supreme Court declared, flatly, that "the right to be heard would be, in many cases, of little avail, if it did not comprehend the right to be heard by counsel."¹⁷ Even "the intelligent and educated layman ... lacks the knowledge" successfully to represent himself. How much "truer is that of the ignorant and the illiterate?" Anyone "haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless one is provided."¹⁸ This, the justices have said, seems "an obvious truth."¹⁹ And "obvious" it remains—for civil as well as criminal disputes. The difference, apparently, is that in the civil justice system we are satisfied to ignore what is patently true. The inability to obtain counsel defeats, literally defeats, the constitutional call for a fair and meaningful hearing. But we choose to turn our gaze away from that irrefutable reality.

Third, other advanced western democracies—democracies that perhaps talk less about equality—far outpace us. The American Bar Association reports that "most European and Commonwealth countries have had a right to counsel in civil cases for decades." In rulings that bind over 40 nations and 400 million people, the European Court of Human Rights has determined that, at least in complex cases, indigents "fail to receive a fair hearing" unless rep-

resented by counsel at public expense.²⁰ Great Britain spends 16 times as much per capita on legal services for the poor as we do. New Zealand spends six times as much. Canada three. We advertise our commitment to equal justice more proudly, more vocally, than any other nation. We are seemingly satisfied with mere advertising.

Fourth, we aren't mere neutral umpires here. We have created, at the hands of the state, overarching tribunals for the resolution of private and public disputes. They are, at bottom, the only effective and ultimate means of finally resolving a massive array of civil controversies. We have, in turn, assured that these fora are hugely complicated, cumbersome, mysterious, professionally technical, adversarial, and expensive. Litigants are assigned the primary and costly tasks of discovering and asserting the controlling legal standards, marshalling the relevant facts, organizing them for presentation, offering them through convoluted rules of evidence, arguing compellingly before a jury, and appealing or sustaining the judgment. Pulling off these steps requires no small measure of experience, sweat, wit, and expertise. It is as far beyond the kin of most citizens as brain surgery is to me. That means, of course, that, without counsel, the door we have theoretically opened is, in fact, closed.

We could, perhaps, have done otherwise. Even now, it would be possible to dramatically simplify the rules and resolution methods for large swaths of disputes, making the use of lawyers unnecessary. Despite the challenges of access, we have chosen not to do so. Having followed this path, we can't now credibly claim that the decision to operate and subsidize a system that continually excludes so many citizens is merely neutral and unobjectionable. It is, rather, just that—a decision, a choice. One that cannot be squared with our stated constitutional aspirations.

My claim is not, inevitably, that North Carolinians enjoy the right to a lawyer in all civil cases. I call, instead, for the constitutional recognition that, in many disputes, the absence of counsel results in the effective denial of a meaningful opportunity to be heard. In the European system, for example, the provision of counsel is "determined by the particular facts and circumstances ... the complexity of the case, and the applicant's capacity to represent himself effectively."²¹ The focal point, though, should be whether it is realistic, or merely cynical, to assume that the judicial forum can be successfully navi-

gated without the aid of counsel. And that determination is, at bottom, the responsibility of courts to enforce. More than any other institution, they are positioned to say that such rank exclusion cannot stand. Judges aren't immune from the huge chasm which exists between our asserted commitment to equal justice and the harsh reality of economic marginalization. Ultimately, they're responsible for it.

There would be a heartening irony were North Carolina courts to lead the nation in a quest to begin to make the promises of equal civil justice real. *Lassiter v. Department of Social Services of Durham*, the United States Supreme Court decision that did so much to remove the question of meaningful access from our constitutional agenda, was, as I mentioned, a North Carolina case. If we helped push the nation in so foundationally tragic a direction, we perhaps carry an added burden to aid in correcting the course. Our own constitution recognizes that a "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."²² That "recurrence" is long overdue. ■

Gene Nichol is a professor of law and director of the Center on Poverty, Work, and Opportunity at the University of North Carolina. He would like to thank Jabeen Ahmad, Clay Turner, and Tarik Jallad for their strong research efforts on access to justice.

Endnotes

1. Ken Schorr and Carol Spruill, North Carolina Equal Access to Justice Commission, *The Initial Report of the North Carolina Equal Access to Justice Commission* (May 2008).
2. Justice 4ALL of North Carolina, <http://4allnc.ncbar.org> (last visited Oct. 4, 2009).
3. North Carolina State Bar IOLTA Program, www.ncbar.gov/programs/iolta.asp (last visited Oct. 4, 2009).
4. Ken Schorr and Carol Spruill, North Carolina Equal Access to Justice Commission, *The Initial Report of the North Carolina Equal Access to Justice Commission* 21 (May 2008), www.ncbar.org/download/probono/nccajFullSummitReport.pdf.
5. American Bar Association, *ABA Report to the House of Delegates—Resolution 112A*, 10 (Aug. 7, 2006) available at www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.
6. Tony Pugh, *Growing Numbers of Poor People Swamp Legal Aid Offices*, McClatchy Newspapers, July 9, 2009, www.mcclatchydc.com/homepage/story/71580.html.
7. *Marbury v. Madison*, 5 U.S. 137 (1803).
8. See, e.g. *Griffin v. Illinois*, 351 U.S. 12 (1956).
9. 452 U.S. 18 (1981).

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We want your fiction!

Historical Fiction

Romance

International Espionage

Humor

Science Fiction

Seventh Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce that it will sponsor the Sixth Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, *the story may be on any fictional topic and may be in any form* (humorous, anecdotal, mystery, science fiction, etc.—*the subject matter need not be law related*). Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. *Articles should not be more than 5,000 words in length* and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar ID number, placed only on a separate cover sheet along with the name of the story.

6. All submissions must be received in proper form prior to the close of business on May 28, 2010. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.



Deadline is May 28, 2010

Judicial Independence

BY HARRY F. TEPKER

In 2006, Justice Sandra Day O'Connor offered both a memory and a complaint: "Directing anger toward judges enjoys a long—if not exactly venerable—tradition in our nation." Perhaps, as one target for criticism, she should be forgiven for believing "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."¹ It is a doubtful historical claim, but there is no doubt that the role of the federal judiciary in our democratic republic remains contested.

Still, mere debate is not a true threat to judicial independence, despite the occasional claims of some of the Court's defenders (including Justice O'Connor). But there is danger if America loses its memory. Some of our most revered political leaders launched attacks on an independent judiciary that were far more dangerous and potentially destabilizing to our constitutional system.

Judicial Independence, the Revolution, and the Constitution

Judicial independence does not require that politicians or citizens refrain from crit-

icizing the courts. The "rage" perceived by Justice O'Connor is nothing more—and nothing less—than a manifestation of America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"—judges included.²

The dilemmas and paradoxes of the issue begin with the expectation that law must be the product of majority rule and ordinary political processes. Judges were

not to be political. The role of judges was to expound and enforce the laws as given by legislatures and the people, but their discretion was presumed to be narrow and disinterested. If these expectations seem naïve today, it remains important to remember how central the ideas were to America's first ideas of constitutionalism.

John Adams believed the independence of the courts was an important factor in the case for American independence. A few months before Mr. Adams achieved his goal of a declaration of independence, he identified the issue as a central concern in the disputes between the colonies and the



British sovereign.

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.³

Mr. Adams had an exalted idea of what judges do and who they should be:

The judges therefore should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention.⁴

But he also had a narrow view of their function:

Their minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or in other words their commissions should be during good behavior, and their salaries ascertained and established by law.⁵

Judges were set apart from the political process and not dependent in their office on the political process, and immune—within limits—from reprisal by the political process.⁶ Adams's point was affirmed by his friend and ally (at the time), Thomas Jefferson, in the Declaration of Independence. The king "has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.... He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

In many respects, there is little connection between the arguments made by colonials in defense of their decision to separate from Britain and the operative principles of government in their second constitution drafting effort. But article III, § 1 of the Constitution of the United States provides the basis—and the sum total—of constitutional principles regarding judicial independence: "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior." Also, there was to be no reprisal by reducing compensation: The judges "shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in

office."⁷ However, judicial independence came to be a broader concept and a matter of greater controversy.

An Early Battle over Judicial Independence and Impeachment

From the time that John Marshall began to transform the Supreme Court from "the least dangerous branch"⁸ into the most powerful court the world has ever known, many Americans have complained of excessive judicial power. For many defenders of judicial review, independence means that court rulings must be treated as final and settled. Professor Larry D. Kramer offered important historical perspective to show that the constitutional guarantees of "independence" leave open many alternatives:

What did earlier generations of Americans do? What did Jefferson, Jackson, Lincoln, the Reconstruction Congress, and Roosevelt do? The Constitution leaves countless political responses to an overly assertive court: Justices can be impeached, the court's budget can be slashed, the president can ignore its mandates, Congress can strip it of jurisdiction, or shrink its size, or pack it with new members, or give it burdensome new responsibilities, or revise its procedures. The means are available, and they have been used to great effect when necessary—used, we should note, not by disreputable or failed leaders, but by some of the most admired Presidents and Congresses in American history.⁹

When the Constitution was ratified in 1788, many of its principles were only in the process of formation. Understandings were fluid. Most constitutional law courses begin with the idea that *Marbury v. Madison* clarified the role of the federal courts in the American system,¹⁰ though even that cherished tradition finds resistance from academicians who cherish originality.¹¹ Even more important than Marshall's opinion was the political context surrounding the Court and the case. In truth, *Marbury* would have meant little had Thomas Jefferson torn the foundations of judicial independence apart, as indeed he tried to do.

After the outgoing Adams administration and the lame duck Congress (dominated by the Federalist Party) created and

filled judicial offices for the party faithful, the Jefferson administration mounted a comprehensive assault on the judiciary. The Jeffersonians developed a series of arguments and proposals to undermine the federal judiciary. The judges were too political; they undermined majority rule; lifetime service permitted elitism, corruption, and aristocratic rule.

Congress enacted legislation stripping the lower federal courts of jurisdiction and the Court bowed deeply and deferentially to sustain the law.¹² The chief of the United States, John Marshall, was worried—most particularly by another element of the Jeffersonian assault, which was even more threatening to the future of the judiciary: impeachment and removal of federal judges.

The Jeffersonians targeted Samuel Chase, a signer of the Declaration of Independence who was appointed associate justice in 1796. He opposed ratification of the Constitution because it lacked a bill of rights. In an early decision, *Calder v. Bull*, he penned a defense of the power of the judiciary to enforce unwritten principles of natural law against the states—before the Marshall Court and *Marbury's* "establishment" of judicial review.¹³

Like many politicians of the day, Chase seemed to change his point of view and his political affiliations. Sometimes the only rhyme or reason to such changes seemed to be whether one liked Thomas Jefferson or not. Chase became an outspoken Federalist. He voiced his political opinions from the bench as part of instructions to juries; he injected his politics as dicta in his opinions; he bullied lawyers and litigants. And, when he presided at the trial of the notorious scandalmonger John Callender, he refused to allow the defense to submit legal and constitutional arguments against the infamous Sedition Law of 1798. He did not tone down his bitter partisan rhetoric during the election of 1800. He continued to blast President Jefferson for all his faults, real and imagined.

Led by "talented, if peculiar" Representative John Randolph of Virginia, the House alleged Chase had "behaved in an arbitrary, oppressive, and unjust way." He rendered "his legal interpretation on the law ... before defense counsel had been heard." He was guilty of "political excess threatening to political institutions." In the

final article of impeachment, the House accused Justice Chase of conduct "tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partisan."¹⁴

The issues were sensational—and fundamental. Could a judge be impeached for expressing unpopular political opinions? Chase was accused of bullying lawyers and judges. Was such "misconduct" enough for removal? Judges were to serve for life, assuming good behavior. Did rulings at odds with legal principle add up to "high crimes or misdemeanors"? Could a judge be removed for bad behavior that was not criminal? The Constitution's text was ambiguous, as is so often the case. Two clauses were relevant: One spoke of judges holding office "for good behavior." The other spoke of impeachment and removal for "high crimes and misdemeanors."

Politics and the rule of law were in the balance. At the time the Senate took up the case against the Federalist justice, its members included 25 Jeffersonian Republicans and nine Federalists. A straight party-line vote would remove Chase. If a Republican majority removed Chase, perhaps the president could impeach other judges—including his cousin and adversary, John Marshall, chief justice of the United States. The great chief justice took the threat seriously. In addition to his attempt to sidestep dangers in *Marbury* and *Stuart*, Marshall proposed allowing unpopular Supreme Court rulings to be reversed by vote of Congress.¹⁵

Chase appeared before the Senate on January 4, 1805, to declare that he was being tried for his political convictions rather than for any real crime or misdemeanor. The presiding officer was the vice-president of the United States, Aaron Burr.

Burr has rarely been remembered as a hero. More frequently, he is described as villain, scoundrel, or opportunist. Washington, Adams, Jefferson, and Hamilton all distrusted him—a pattern not likely to help anyone's historical reputation. Only recently have a few histories and biographies attempted to rehabilitate his memory—with mixed results. But historians generally agree that at this moment of history, the vice-president did what politicians too often do not do. He did his job. He did his duty. The trial occupied the last weeks Burr served as vice-president.

Burr owed little to the president, who

had shunned him. Burr had won an equal number of electoral votes in the election of 1800 (a party presidential elector cast two votes for president under the system of the day), but Burr, known to be candidate for vice-president, took his chances and allowed a Federalist-dominated, lame-duck House to consider him for the presidency. Jefferson considered his conduct a betrayal. Influenced by Alexander Hamilton, who chose his rival Jefferson over his enemy Burr, the House selected the Virginian after an extended impasse. Burr lost his party's support, and then he flirted with Federalists in an attempt to become governor of New York. But, his passionate foe, Hamilton intervened, and Burr again suffered defeat.

The Burr-Hamilton relationship deteriorated further after an exchange of correspondence. Eventually, Burr challenged Hamilton to the most famous duel in American history. The sitting vice-president shot and killed the former secretary of the Treasury in July of 1804.

Only a few months later, Burr assumed the chair of the Senate as a court of impeachment. He had been indicted by New York and New Jersey for murder. He stayed in the nation's capital, where he was immune to prosecution. But his political career was over, and he knew it. A Federalist newspaper observed of the Chase impeachment trial, "it was the practice of the courts of justice to arraign the murderer before the judge, but now we behold the judge arraigned before the murderer."¹⁶

Many senators hoped (or feared) Burr would cooperate and allow the majority to rush to judgment. But Burr gave Chase's lawyer, Luther Martin, the opportunity to present a complete defense. By all accounts, Burr set a good standard for decorum and fairness during the trial, though there was some complaint that the vice-president exercised too firm an influence on issues thought to be the province of senators.¹⁷ Federalist senators had little hope that the murderer of their hero would serve justice, but as Senator Samuel Taggart, a Federalist from Massachusetts, observed later: "I could almost forgive Burr for any less crime than the blood of Hamilton for his decision, dignity, firmness, and impartiality...He is undoubtedly one of the best presiding officers I ever witnessed."¹⁸

Chase himself may not have been as

enthusiastic in his description of the vice-president. He "unnerved Chase by interrupting when he saw fit, and Chase was reported later to have been on the verge of tears."¹⁹ The vice-president shared the prevailing view that the associate justice was a "bully.... He had made it a habit to hector and badger defense attorneys; he made arbitrary and impulsive rulings; and he took punitive action against grand juries that refused to do his bidding."²⁰ But rather than cooperate in an effort to compromise the court's independence, "Burr decided to teach the bully a lesson."

Six Jeffersonian Republicans joined nine Federalists who voted not guilty on each article. The Senate on March 1, 1805, acquitted Samuel Chase on all counts. A majority voted guilty on three of the eight articles, but the votes for conviction on each article fell far short of the two-thirds required for conviction.

As the distinguished historian Charles Warren observed, the acquittal was an important event in the development of traditions of an independent judiciary. The Senate effectively insulated the judiciary from impeachment and removal based merely on disapproval of judges' rulings and opinions.²¹ A chastened Chase resumed his duties on the bench, where he remained until his death in 1811. Thomas Jefferson was angry. Chief Justice Marshall was relieved.²²

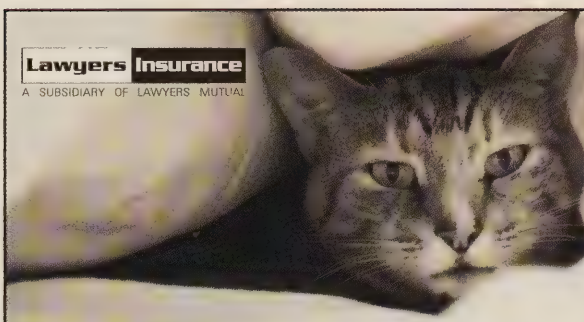
The Jeffersonian cry for controlling the federal judiciary was the first of many political outbursts threatening impeachment, removal, and retaliation for political reasons. In the 1960s, as noted by Justice O'Connor, "I can distinctly remember seeing lawns and highways across the country that featured signs demanding the impeachment of Chief Justice Earl Warren."²³ Justice William O. Douglas endured explicit threats of impeachment by future President Gerald R. Ford, even as one of his colleagues, Abe Fortas, was forced off the bench in the Nixon administration's efforts to create a Supreme Court more to its liking.²⁴ More recently, hated decisions of the Supreme Court on human rights issues, such as the abolition of capital punishment for juvenile crime, led to renewed calls for impeachment and removal of justices who had the temerity to read and cite the law of other nations defining basic human rights principles.²⁵

Almost all of this rhetoric stung at justices who wanted to be liked and admired for their work, but in truth the arguments tended to be "sound and fury signifying nothing." The rule of law prospered, but only because Aaron Burr helped make sure that Thomas Jefferson failed in his vendetta.²⁶ ■

Harry Tepker is the Calvert Chair of Law and Liberty and a professor of law at the University of Oklahoma. This article is drawn from remarks before the Tenth Circuit Regional Conference of the American College of Trial Lawyers on June 22, 2007, in Oklahoma City, California. His thanks go to Dean Andrew M. Coats for the opportunity to present to the ACTL and to Elizabeth Fucci, his research assistant.

Endnotes

1. *The Threat to Judicial Independence*, Wall Street Journal (September 27, 2006).
2. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).
3. John Adams, *Thoughts on Government* (April 1776), reprinted in Philip B. Kurland and Ralph Lerner (ed.), *The Founders' Constitution* (1987), vol. 1, ch. 4, Document 5. (<http://press-pubs.uchicago.edu/founders/documents/v1ch4s5.html>).
4. *Id.*
5. *Id.*
6. Of course, Adams agreed judges could be impeached and removed for "misbehavior." *Id.*
7. These principles were the basis of a rare consensus between Adams, Jefferson, and their frequent adversary, Alexander Hamilton, who explained the Article III provisions:
The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.
Alexander Hamilton, *The Federalist* No. 78 (May 28, 1788).
8. *Id.*
9. *The People Themselves: Popular Constitutionalism and Judicial Review* 249 (2004).
10. Harry F. Tepker, *Marbury's Legacy of Judicial Review After Two Centuries*, 57 Okla. L. Rev. 127-42 (2004).
11. Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. 553, 554 (2003).
12. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (upholding the repealer act of 1802) ("Congress have constitutional authority to establish, from time to time, such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.") Ironically, in *Marbury*, the chief justice had established



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the power of judicial review by holding "unconstitutional an act of undoubted validity," Leonard W. Levy, *Original Intent and The Framers' Constitution* 87-88 (1988), while subsequently upholding in *Stuart* as constitutional a law that was almost as certainly unconstitutional. See also, e.g., *Levinson* at 556 (describing *Stuart v. Laird* as "a far more significant capitulation by the Federalist majority to the determination of the Jeffersonians to escape the judicial handcuffs crafted by [the] Adams [administration]").

13. 3 U.S. (3 Dall.) 386. Justice Chase's arguments were rebutted—memorably and effectively—by the practical arguments offered by Justice James Iredell from North Carolina.
14. Isenberg at 274.
15. James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* 205 (2002).
16. *Id.* at 200.
17. Buckner F. Melton, Aaron Burr: *Conspiracy to Treason* 62-71 (2002) includes a balanced, short summary of the Chase proceedings in a book otherwise devoted to Burr's alleged plot to dismember the United States.
18. Isenberg at 275, 277.
19. *Id.* at 275-76.
20. *Id.* at 276.
21. Charles Warren, *The Supreme Court in United States History* 293 (1922).
22. Two years later, ironically, the central figures of the Chase impeachment became involved in another important case in the history of law and liberty. Jefferson pursued Aaron Burr: the former vice-president

was tried for treason after an alleged conspiracy to create a new republican empire in the west. John Marshall presided. Luther Martin, Chase's attorney, became Burr's attorney. In a historic decision, the great chief justice insisted on a high legal standard for proof of treason, and Burr won acquittal from a jury. See Buckner F. Melton, Aaron Burr: *Conspiracy to Treason* (2002).

23. *The Threat to Judicial Independence*, Wall Street Journal (September 27, 2006).
24. For background on the efforts to remove Douglas and Fortas, see John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court* (2001).
25. Of course, the rhetoric of impeachment can be dark and threatening. For example, after a controversial decision abolishing the death penalty for juvenile crime, Phyllis Schlafly and Senator Tom Coburn of Oklahoma suggested that Justice Anthony Kennedy's invocation of foreign legal authority was just cause for impeachment. His use of "foreign law" was not "good behavior." Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, Washington Post, Apr. 9, 2005, at A3. Worse, at a Washington, DC, conference of conservative political activists, Dr. Edwin Vieira offered a recommendation, quoting Stalin: "No man, no problem." *Id.* ("The full Stalin quote . . . is 'Death solves all problems: no man, no problem.'"). Presumably, Vieira too was committed only to impeachment and removal, not something more violent. Yet, when so-called, self-described conservatives start quoting the darkest words of Joseph Stalin about appropriate political tactics, one ought to question what is truly "conservative."
26. See Joseph Whealan, *Jefferson's Vendetta: The Pursuit of Aaron Burr and the Judiciary* (2004).

Crossing Borders

BY SHERYL BUSKE

O n a blazing hot
North Carolina
afternoon in July,
my research assis-

tant Carol Fletcher (3L), my seven-year-old daughter

Grace, and I set off for Arusha, the Tanzanian village at

the base of Mt. Kilimanjaro where my daughter and I



Sheryl Buske's seven-year-old daughter, Carol Fletcher, and Professor Buske on safari.

lived before moving to Charlotte. I was looking forward to continuing my work on children's issues and developing new relationships that will, hope-

fully, ripen into future opportunities for CharlotteLaw (CSL) faculty and students.

On a more personal level, for Grace and me, it was, in part, a journey back to our old home and the chance to reconnect with dear friends. Over the next month, we would travel to Tanzania and later on to South Africa, meet with lawyers and judges, both American and African, visit Tanzanian and South African law schools, meet with many, many organizations and non-government organizations (NGOs) working in children's rights, teach a CLE session on female genital mutilation (FGM), present at an international conference on Inter-Country Adoption, and even buy a goat and crash a wedding.

TANZANIA, EAST AFRICA

Three flights, three countries, and more than 24 hours after leaving Charlotte, we landed at the Kilimanjaro Airport about 9:00 at night. We descended off the airplane onto the tarmac in near complete darkness; but for the lights shining from inside the airport and the flashlights of the airport staff showing us the way inside, we would not have been able to see past our own hands. There are many things about Africa that simply can't be recreated anywhere else in the world. For me, the darker-than-dark that is an African night is one of those things.

The weariness that accompanies long-distance travel never ceases to evaporate when my feet hit the African ground. In a way that I can't explain, a knowing, a sureness that I am exactly where I am supposed to be settles over me every time I return. After claiming our bags (always a drama-laced half-hour watching as bags emerge from the belt one-by-one) and the obligatory stare down from the customs officials, we emerged through the doors to the chaos that is the arrival area. To mine and my daughter's great delight, our dear friend Ernest was there to meet us. I met Ernest years ago on one of my early trips to Tanzania when he was my driver. When we moved to Tanzania, much

of what I accomplished in the first few months, including renting and furnishing a house, having it fumigated for rats and snakes, having utilities connected, buying a car, and learning to drive there, was due to him.

The drive from Kilimanjaro Airport to the village of Arusha takes a couple of hours at night, roughly twice what it takes during the day. Several things necessitate extra time and caution at night: the absence of lights combined with the likelihood of animals or people on the road, poor road conditions, and, although less of a problem in the last year due to increased police presence, the possibility of ambush by bandits. As we entered the edge of town, I was struck by how much it has changed in such a short time. New, big hotels were going up. Old hotels no longer exist. And one of the biggest surprises? A huge video screen has been installed at the clock tower roundabout, the main traffic circle in the village. Advertisements and short animal clips play during the day. When it was first installed, it was such a shock that it caused enormous traffic jams and car crashes. Now, the circle is lined throughout the day with people who stand and watch it for hours on end as if it were a movie theatre! That night, as we settled into our hotel, I couldn't help but think about the changes I could see around me and wonder about the ones I couldn't.

UN International Criminal Tribunal for Rwanda

One of the reasons for being in Tanzania was to meet up with a group of Illinois Appellate and Supreme Court judges, lawyers, and physicians who had travelled to Tanzania as part of a CLE program sponsored by Global Alliance for Africa (GAA), a Chicago-based NGO that does amazing work with orphans and vulnerable children in Africa. I had been invited to teach a CLE course for the group later in the week, but on our first morning we met them at the UN International Criminal Tribunal for Rwanda. The tribunal was established in 1994 to prosecute those responsible for war crimes committed during the Rwandan genocide in 1994. After clearing security, we sat in and watched part of the trial of Dominique Ntawukuliyayo, the former sous-préfet in Butare Prefecture. He is charged with genocide, or alternatively, complexity in genocide as a result of his role in the massacre at Kabuye Hill, where 25,000 Tutsi were killed. According to the prosecution, Ntawukuliyayo ordered the Tutsi rounded up and killed on the hill after

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In Arusha at the UN's International Criminal Tribunal for the Rwandan Genocide.

they had been told they would be protected. He's also charged with direct and public incitement of genocide as a result of his role in public demonstrations during which he gave instructions to "flush out and kill all remaining Tutsi who were in hiding."

After watching the trial for a bit, we had a private meeting with Charles Adeogun-Phillips, the senior trial attorney and lead prosecutor for the tribunal. He has been at the tribunal since its beginning and spoke with great candor and passion about the challenges the tribunal faces. Among those challenges is the difficulty in locating suspects, most of whom are no longer in Rwanda. Indeed, Dominique Ntawukuliyayo was apprehended in the French town of Carcassonne. Because the tribunal lacks jurisdiction over suspects outside of Rwanda, the UN must depend on the cooperation of member states. While it might seem that international cooperation with the tribunal could be expected, Mr. Adeogun-Phillips explained that many of the nations are politically "indifferent" to the prosecution of international war crimes. Some nations, African nations in particular, are torn between maintaining peace and pursuing justice. For some nations, the risk that cooperating in the prosecution of 15-year-old crimes could jeopardize newly achieved and relatively fragile peace by disturbing existing alliances is too high.

Another challenge is how the tribunal is perceived by Rwandans. Many Rwandans have mixed feelings about the tribunal. This is not surprising given their deep belief that the international community abandoned them during the genocide. Indeed, as the UN secretary-gen-

eral acknowledged in 1994, the international community must share some of the responsibility for the genocide due to its failure to intervene quickly. Some have even suggested that Rwandans themselves are conflicted about the ongoing trials, torn between pursuing justice through criminal accountability and moving past that to working towards national reconciliation. One result, according to Mr. Adeogun-Phillips, is that, today, many Rwandans have lost interest in the tribunal and have very little idea about what it is actually doing and are, for the most part, unaware of the convictions resulting from the prosecutions. He believes this is a critical failing of the tribunal. In his opinion, Rwandans must actually see the workings of the tribunal for justice to have any real meaning. Otherwise, the convictions are little more than hollow political victories unconnected to the true victims and their suffering. That is why, according to him, it was important that the Special Court for Sierra Leon be located in Freetown, in the country where the atrocities were committed.

The tribunal's presence and purpose are complicated issues. Some have questioned, even criticized, the millions of dollars the tribunal has cost and have argued that the money would have been better spent on social development programs in Rwanda. Others have criticized the slow pace at which the trials have moved. Even among the local Tanzanians in Arusha, the tribunal is controversial. Arusha has a long history of expat families; until the tribunal, most expats were missionary-based whose standard of living was not terribly different from the average Tanzanian. The arrival of



Left, the tent that Carol and Professor Buske (and her daughter) stayed in while in Tanzania. Below, Carol Fletcher with a Massai warrior.



the tribunal fundamentally changed the makeup of the expat community. Instead of missionary families of limited means who lived lives similar to Tanzanians, tribunal families arrived with their container shipments and a standard of living that was unrecognizable to most Tanzanians. The gap in the standard of living between the expat community and the local Tanzanians has gotten wider and wider. While the locals recognize that the tribunal directly and indirectly employs huge numbers of Tanzanians, they also point to the resentment over the gap between the wealthy expats and the local community as the reason behind the rise in violence and crime in the last few years.

The tribunal does cost an enormous amount of money. There are lots of people, including genocide survivors, who would rather the tribunal ended. There is also no doubt that its presence has forever changed Arusha from the small village it once was. Still, despite the cost and the problems, I believe the tribunal must continue. I've spent too many evenings over long dinners with friends from the tribunal and Joe, a quiet and dignified man whose machete scars are a constant reminder that he is the only member of his family to have survived the genocide, to believe otherwise.

Safari & CLE

No trip to Tanzania is complete without a safari. This time, we traveled with the GAA group to Tarangire National Park. We left Arusha early one morning and headed out across the Tanzanian plains. As Americans, in safari trucks with African drivers, we couldn't have signaled "TOURIST" any louder if we

had tried. It wasn't surprising then when we were pulled over by the traffic police about 20 miles outside of Arusha. Given that the traffic police have no authority outside of town, it seemed a tad suspicious. In the end, though, it was just easier (as it usually is) to give a "gift" to the officers than return to town to debate their authority. Once on the road again, we passed the occasional Tanzanian walking along the road, groups of Massai herding goats and cattle, and patches of children who ran to the road to point, wave, and squeal with laughter as we passed them.

At the lodge where we'd spend the night, we were first welcomed and then warned about the animals that roam the property. We were told that while we were free to wander about on our own during the day, we had to be escorted by Massai warriors after dark. If you've ever watched documentaries about Africa, you've likely seen this tribe and know they have a great warrior tradition. They live in the grasslands between Kenya and Tanzania and are easily recognized by their bright clothing and beaded jewelry. They are extremely independent and have maintained their traditional lifestyles when most other tribes have gradually assimilated. Known for their honor and strength, they often work as "askaris" (guards). When we lived in Arusha, two brothers, Ngaranpusi and Joseffii, worked for us as guards. In their "shukas" (the bright cloth they wear wrapped around their waist and over their shoulder) and with spears and the ever-present machetes, they stood guard over us every night while we slept.

Tarangire, with volcanic mountains in the

background, is known for the wide range of animals that roam through the 1,600 square miles due to the reliable water source of the Tarangire River. On that first afternoon, and the following morning, we saw more herds of zebras, elephants, giraffes, tiny dik-diks, and other animals than we could keep track of. Much to our excitement, many of the animals wandered within feet of the truck. Although I've been on many safaris, the magic of seeing such animals in such a magnificent setting never gets old.

That evening, before dinner, I taught a CLE session on FGM (female genital mutilation) for the GAA group. Because the group included attorneys and doctors, the discussion was fairly heated. There was a split among the group as to whether the more benign versions of FGM cause long-term health problems and, if they don't, whether advocacy around the issue is necessary or even appropriate.

Just when the discussion was getting really animated, it was time for dinner. Dinner was a spectacular bush dinner. A bush dinner is just that—dinner served in the bush. Our group was escorted by five or six Massai to the dinner spot and there were another five or six Massai where dinner was set up. Dinner was served at the edge of a cliff overlooking a huge valley.

Dinner was set up at a long table with linens, crystal, and china and lots of candles. We were treated to a fabulous three-course meal under the starry sky with animal sounds in the background and Massai warriors standing guard. It was a great night, full of great food, interesting people, and a little African magic. After dinner, a Massai warrior escorted us back to our tent. The jokes about wild animals in the dark were a little less funny then! We were so tired that we cleaned up and went straight to bed. We expected to sleep like the dead...but, instead, we listened to unknown animals roaming around and bumping up against the tent all night!

OVC: Orphans & Vulnerable Children

The primary reason for being in Tanzania was to continue my orphans and vulnerable (OVC) research and give Carol an opportunity to see how NGOs are working to improve the conditions for children in the Kilimanjaro region. OVCs are a large and diverse group. Some have lost one or both parents (in most parts of Africa, even children with one surviving parent are considered orphans), some are living with extended families, some are living in child-headed households, and some are surviving on the streets. My research has focused on the children who "live" on the street—those who spend all or part of their days on the street. Many of those "street children" have ended up on the street as a place of last resort; others have chosen the streets because it is better than the abusive conditions at home.

Arusha is a magnet for street kids in the Kilimanjaro region. They flock there from the rural areas for several reasons. First, as a larger town, it offers places to "disappear." More importantly, because of the high-end safari and Mt. Kilimanjaro tourist traffic that continually goes through Arusha, there are always tourists who can be depended on for spare change and odd jobs. Finally, word has gotten out that there are several well-respected NGOs who work with street kids.

The relationship between the street kids and the local police in Arusha is difficult. Time and time again, the police have conducted "round-ups" of street kids in which they have done sweeps and arrested as many as they could find, some as young as five-years-old. The sweeps were predicated on an old colonial-era law—the Undesirable Persons Act. As defined by the act, "undesirable persons" include "lunatics, prostitutes, and the homeless." Once arrested, the children were either beaten before they were released, placed in jail

with adult offenders, or, sometimes, driven miles out into the plains and simply dumped out.

Carol and I visited some of the NGOs working with street children in the Kilimanjaro region. Some, like Amani (Kiswahili for "peace"), are residential centers which operate, in many ways, like a shelter. The children who live there have not been "placed" or "committed" there by any official authority. Instead, the children go there on their own and stay only as long as they wish. Amani never turns children away based on space, and the number of children varies from 70-100, ranging in ages from three to 17. Other NGOs, like Mkombozi (Kiswahili for "liberator"), provide direct services to fewer children and focus instead on advocacy and impact litigation. Recently, for example, in conjunction with the East Africa Law Society, Mkombozi challenged the round-ups, arguing that the Undesirable Persons Act violates not only the Tanzanian Constitution, but also the Convention on the Rights of the Child and the African Charter.

There are NGOs working with other OVCs as well. Cradle of Love is a baby home in Arusha. A baby home is short-term residential care for infants who can't be cared for by their families for a variety of reasons, primarily due to the death or poor health of the mother. In a country where baby formula is difficult to get and very expensive, infants who can't be breastfed often die. Baby homes address this specific need by taking in infants and toddlers until they are about two years old. Then, they are either returned to their families, moved to another orphanage, or, in rare cases, adopted.

There are other orphanages for older children as well. In all of Tanzania, there is only one "official" government orphanage. Called Kursini, it is located in Dar es Salaam and has a capacity of about 110 children. There are



Carol Fletcher with children from SSOS Children's Village.

another 250 or so NGO-run orphanages scattered around the country, many of which are faith-based organizations that provide orphanage care for the majority of the children. Some of the orphanages, like the Green Door Home in Dar es Salaam, are small and care for less than ten children. Others, like SOS Children's Village, are very large and care for several hundred children.

We visited these places, and a few others, while we were in Tanzania. There are no easy answers here and there's some degree of controversy around most of the NGOs that work with vulnerable children. For example, some critics argue that NGOs that provide services to street children only encourage more and more children to run to the larger towns and cities. The baby homes are also controversial: critics argue that the money that is spent on baby homes could be better spent by supporting the families so that the infants could stay at home. Orphanages also have their share of critics who take the position that institutional care is never in a child's best interest.

Working on children's issues here sometimes makes me want to throw my hands in the air in frustration. If the truth be told, I have done that and more on occasion. But as frustrating as it can sometimes be, quitting is not an option.

Makumira University College, Faculty of Law

I was a visiting professor at Makumira's law school when we lived there and I was excited to introduce Carol to some of the Makumira students on this trip. We spent one morning at the law school, talking with my friend Dean Pallangyo and some of the students. It was interesting to watch Carol and the Makumira students compare their law school experiences and share their concerns about their futures. I think they found they have much in common, but I think Carol also came away with a new understanding of how much we take for granted with regard to education.

The UN has set universal primary school education as the second millennium development goal (MDG). While the Tanzanian government has made some progress in education, Tanzanian children continue to struggle to attend school. In 2002, Tanzania did away with school fees for primary school, making it, theoretically, free. Nonetheless, the "free" primary school education is still beyond the means of many average Tanzanians due to the inability of families to afford the cost of uniforms, lunch fees, and chalk fees (an administrative fee intended to cover the cost of supplies, including chalk). At the secondary level, there are even more challenges. Tanzania has the lowest secondary-school enrollment rates in sub-Saharan Africa. Less than 20% of primary school students who score well enough on exams to be eligible to attend secondary school actually do so. The low enrollment is attributed to the inability of families to afford school fees and the severe shortage of secondary schools. The shortage of secondary schools has resulted in extreme over crowding—in some schools the students-to-teachers ratio exceeds 70 -1. Given the obstacles students must overcome, the ones who make it to university are nothing short of remarkable.

In addition to the challenges faced by law students the world over, Tanzanian law students must also cope with the lack of resources. Unlike their American counterparts, Tanzanian students do without laptops, the internet, or their own books. Instead, they rely on the books in the law library, copying the material by hand. As I well remembered, and Carol discovered, the "law library" at Makumira is really just three shelves of books in the "main" library. Those three shelves are made up of casebooks from the US, UK, and parts of Africa, but very few from Tanzania. Recognizing this need and their ability to help,

a group of CharlotteLaw students has taken on the task of raising money to purchase Tanzanian law books for Makumira students. More information about the project can be found at <http://cslegallybound.blogspot.com>.

After touring the school, including the classroom in which I once ended class early because a snake had gotten in a back window, Dean Pallangyo and a group of students joined Carol and me for lunch at a little local place near the school. They were full of questions, including why the divorce rate is so high in America, what we think about Iraq, and crime in America. Some of the liveliest discussion was around marital rape. The Tanzanian students were shocked to hear that American husbands can be charged with raping their wives. Such criminal charges are in stark contrast to Tanzanian law that permits either spouse to sue the other in civil court to enforce their right to sexual intercourse. It was a great day, in part because of the budding friendships between Carol and the Tanzanian students.

A Goat and a Wedding

One day we bought a goat and crashed a wedding. Buying the goat was an experience in itself. First, we picked up John, the goat-sitter. Then we drove out to a field on the edge of town and found a herd of goats being tended by a Massai. Ernest and John walked across the field and negotiated for the goat. We had given specific instructions about which goat we wanted—because it was going to have to ride inside the van with us, we wanted a CLEAN goat. Ernest, John-the-goat-sitter, and the Massai haggled over the price and we ultimately paid about \$35USD for it. We watched as they tried to "herd" the animal across the field to the van. In the end, they simply picked it up and carried it. The bewildered animal was put into the back of the van, much to my daughter's delight, and off we went.

John-the-goat-sitter and the goat waited beside the road while we changed clothes at the hotel. We hadn't planned to attend a wedding and hadn't packed appropriate clothes, but Ernest swore we didn't have to dress up, so we didn't. Between Carol and me, one of us was dressed alright and the other was in jeans and gym shoes. Even so, we convinced ourselves it would be fine—until we saw the other guests. We were ridiculously underdressed...and we had a goat.

The Tanzanians were naturally curious about who we were and what we were doing there (whether we were, in fact, officially invit-

ed was still not clear), but they were incredibly kind and welcoming. We were seated in the front row in seats of honor, we were welcomed into the dancing, and assigned our own babysitter to translate and look out for us. At the reception, there were the usual toasts and speeches followed by dinner. The big event followed dinner: the gifting. The bride and groom and their families formed a receiving line and everyone went through it and gave the couple their gifts. We were at the very end of the line. Giving a goat as a wedding gift is a "big deal." Carol, Grace, and I (and the goat) were announced and joined by the bride's sister. We then proceeded down the main aisle, singing, dancing, and clapping the whole way until the end when we presented the couple with the goat-on-a-rope.

We were never sure whether we were actually invited to the wedding. Although Ernest swore we were, the bride certainly seemed surprised to see us. Even though our invitation was questionable and we were underdressed, the Tanzanians made us feel as if we had somehow honored them with our presence.

I'm sometimes asked why I spend so much time in Tanzania. I've always had a hard time describing the pull it has on me. Years ago I fell in love with the place, with the people, and with the opportunity to really use my legal education to help improve the lives of children. There is great need there. But there is also an amazing thing happening—committed, creative, and compassionate people from many disciplines are taking the best of what they know from where they come and are creating child welfare systems from scratch. It's a fascinating process and, while I am privileged to have some small part in it, the truth is I need Tanzania's children more than they need me.

SOUTH AFRICA

Too soon it was time to leave Arusha, and Ernest drove us back to the Kilimanjaro Airport for our flight to Bloemfontein, South Africa. I was full of mixed feelings during the ride to the airport. I was looking forward to the next phase of our trip, but leaving Arusha is always hard for me because it makes me hyper-aware of the privileged life I lead. I know that Ernest and his wife Ava have the same hopes and dreams for their daughter as I do for my mine. And, while I also know that much of what my daughter ultimately achieves will be determined in a large part by what she wants and how hard she works, I know the same is not true for Ernest's daugh-

ter. The unfairness of this weighs on me every time I leave Tanzania.

University of the Free State, Faculty of Law

Charlotte School of Law and University of the Free State, Faculty of Law (UFS) are forging a new relationship that will result in future collaborative projects for CharlotteLaw and UFS faculty and students. UFS showed itself to be a grand host, filling our days with opportunities to guest lecture at the school, present at an international conference on adoption, and to spend a significant amount of time in the community with a variety of children's NGOs. I was delighted to have the opportunity to guest lecture in several law school classes, in both clinical and substantive courses. Legal education in South Africa follows a British model in that law school is an undergraduate program instead of graduate school and the students are, therefore, generally younger than their American counterparts. Despite those differences, I found the UFS students to be engaged and more than a little curious about our legal system. Most surprising, however, was the discovery of their well-developed opinions about our criminal justice system. The right to a (criminal) trial by a jury of one's peers is one of our oldest individual liberties, developed in response to attempts by the British to deny American colonists fair trials. While the jury process itself has had a spotted history, with a few blemishes along the way, it is generally perceived to be essential to a just system. Not so to the UFS students—they were surprisingly vocal about their belief that criminal defendants cannot get a fair trial in a jury system and that it should be abolished. They also found our dual system of federal and state government to be confusing and unnecessary. They found it extraordinary that someone could face both federal and state prosecution from a single event. We, on the other hand, found it equally surprising that South Africa has a special Court of Equity which hears cases and permits plaintiffs to recover for ordinary insults. Essentially, name calling and the like that does not rise to the level of a tort is still actionable.

We also spent a great deal of time outside the classroom with UFS faculty and students. On one of our last nights in Bloemfontein, one of the UFS professors invited us, along with other UFS faculty and a few students, to her home for a traditional South African brie (a barbecue dinner). As is the way with dinner parties, the conversation was wide-ranging,

skipping across a variety of topics, ultimately landing on higher education in South Africa post-apartheid. With the exception of Carol and me, everyone else was South African and had lived there their entire lives. The differences in their age, gender, and race, however, gave them all very different perspectives about what legal education should look like and what it should be trying to accomplish. For starters, there was debate about in what language(s) classes should be conducted. On the one hand, the official language of the court system is English. On the other hand, a significant percentage of the South African population does not speak English. This has lead UFS to require all professors to teach every class twice: once in English and then again in Afrikaans. It also appears that UFS will require a third language in the near future. The bigger debate was around how to create and maintain a rigorous and demanding legal education in the current circumstances. The primary and secondary education in South Africa, like Tanzania, is severely lacking in many respects—rural schools in particular are overcrowded, underfunded, and lack basic necessities such as books and paper. Additionally, because of current government policies which tie school funding to graduation rates, primary and secondary schools have an incentive to promote and graduate students even if they are not performing at grade level. Furthermore, due to the grade inflation combined with the absence of any "leveling-factor" such as an LSAT score, universities find themselves with incoming classes of students who are performing at wildly different levels...and in different languages. On top of all this sits race relations in South Africa post-apartheid. It is much more complex than I imagined.

Inter-Country Conference on Adoption

The statistics on AIDS and orphans in Africa are staggering. UNICEF estimates that there are more than two million orphans in South Africa alone. The traditional safety nets of extended families and community services are stretched to the point of breaking and can no longer keep up with the number of orphaned children. Like other countries hit hard by the HIV/AIDS pandemic, South Africa is forced to come up with new responses to the growing numbers of orphans. One response is to recognize and provide support for child-headed households—households in which the oldest child, rarely over the age of 12, functions as the "head" of a household

made up of children. Another response is to actively pursue adoption, specifically inter-country adoption, as an option for children in need of a family.

Some African countries, such as Ethiopia, have embraced inter-country adoption as a permanency option. South Africa, on the other hand, has not done so despite there being no express prohibition against children being adopted by residents of another country. Two explanations are offered: 1) as a practical matter, South African adoption agencies are not equipped to take on the logistical aspects, such as post-adoption follow-up, necessary to ensure good placements; and 2) there is a cultural reluctance of most South Africans to permit, much less actively encourage, the removal of a South African child from South Africa to be raised in another culture, even another African culture.

This reluctance is sometimes hard for Americans to understand. To many Americans, and others, that a child needs and deserves a home with a loving family is more important than debates about taking children from their "culture." On the flip side, many, many people feel strongly that a cultural identity is so important that it outweighs whatever other "benefits" adoption could provide. Indeed, these are the very concerns that lead to our own Indian Child Welfare Act (ICWA). Concerned that Native American children were being removed in large numbers from Native American families and communities, child advocates lobbied for the passage of ICWA, which created certain presumptions and procedures in favor of Native American children remaining within their communities.

We heard the "cultural concerns" expressed over and over at the inter-country conference on adoption at which we were invited speakers. One man in particular stands out in my mind. He was not South African, but he acknowledged that his country struggles with a growing number of orphans as well. Nonetheless, he opposed inter-country adoption as a permanency option. As he so eloquently explained, because civil war, famine, and the AIDS epidemic have robbed his country of an entire generation, they cannot afford to lose more of their people, particularly their children. As a mother, and more specifically as an adoptive mother, I wrestle with this issue all of the time, but ultimately find myself in agreement with UNICEF's position.

The Convention on the Rights of the Child (CRC), which guides UNICEF's work and

was unanimously adopted by the United Nations in 1989, incorporates the full range of children's human rights into a single document. With regard to inter-country adoption, Article 21 of the CRC recognizes that inter-country adoption may be considered if a child cannot be properly cared for in their country of origin. This reflects what I tend to think of as "up-river" and "down-river" interventions. "Up-river" interventions are those early interventions which address problems and may make later drastic measures unnecessary. For example, the creation of support networks such as the Go-Go Getters ("gogo" is Zulu for grandmother), groups of South African grandmothers who come together to learn from and support each other in their roles as caretakers to their orphaned grandchildren, provide resources and support to grandmothers, which in turn makes it possible for them to continue to care for their grandchildren. Adoption, on the other hand, is an example of a "down-river" intervention and should only be used in extreme cases. To be sure, in countries battling growing numbers of orphans, extreme cases may be common. I have no quarrel with inter-country adoption and I believe it is a valid option, perhaps the only option, in many cases. Going forward, however, I do believe that the international community must do more to support the children "up-river" and not default to "down-river" inter-country adoptions as the preferred option for children who cannot be cared for by their parents.

Child Welfare

We visited a wide range of children's NGOs and organizations in South Africa, including private adoption agencies, domestic violence shelters, after-school programs, orphanages, facilities for street kids, juvenile justice programs, and hospice care facilities. I was immediately struck by how different things are in Bloemfontein from Arusha, even taking into account Bloemfontein is a much larger city than Arusha and South Africa's greater resources. One of the most notable differences was the "invisibility" of the street kids in Bloemfontein. There's hardly a place a person can go, local and tourist alike, in Arusha where street kids aren't visible standing in front of shops, sleeping in open areas, and hustling everyone who passes for spare change. In Bloemfontein they were considerably less visible. This was surprising, especially as local NGOs told us that, unlike the Arusha police, the Bloemfontein police have

very good working relationships with street kids and advocacy organizations.

Another difference was the degree of specialized child welfare services. In Tanzania, few NGOs are specialized and instead attempt to provide whatever services are needed. In Bloemfontein, most NGOs seemed to provide specialized services for specific needs. For example, we met with one organization that prepares child victims to testify in court but otherwise has no involvement with the child. It is likely that this specialization results in better services being provided to children; however, it also creates a system that is difficult to navigate because it isn't always clear which organization or NGO has the primary responsibility in any given situation.

This difficulty in identifying the appropriate organization became clear to us when we were approached for assistance by the family who ran the guesthouse where we stayed. One afternoon we returned to the guesthouse and it was clear the family was very upset. They told us that "Mary," the woman who had worked for them for the last 15 years and who they felt was family, had been arrested. Mary is the guardian to a young girl who had been assaulted. Mary was to testify, but due to a miscommunication with the police, she failed to appear in court. Later that afternoon, the police arrested her in front of the girl and the frightened girl ran away. We wanted to help but weren't sure who to contact. In the end, we contacted several UFS faculty members and some of the people at the various organizations we had met. Everyone responded immediately and it was rewarding to be able to put our friends in touch with people who could help them and who understood the system.

Conclusion

Over this past summer, Carol, my daughter, and I travelled through Tanzania and South Africa. Much of what we saw and experienced was familiar, but there were some surprises, too. One of the things that doesn't change is the astonishing beauty alongside palpable ugliness. Another constant is irrepressible joy and kindness amongst great deprivation and need. It is the beauty, joy, and kindness that found me years ago and the reason I will always return there. ■

Professor Sheryl Buske teaches in the area of children's human rights at the Charlotte School of Law. She and her daughter relocated to Charlotte from Tanzania in August 2008. Professor Buske

and Carol's blog about their trip is located at: <http://charlottelawinafrica.wordpress.com/page/2>. She'll be returning to South Africa in early October with two CharlotteLaw students to compete in an International Moot Court Competition. She can be reached at sbuske@charlottelaw.edu.

Endnotes

1. That it is, indeed, a small world never ceases to amaze me. Among the group of judges and lawyers from the GAA group was a woman I had met many years ago and a young man I would not have recognized had I not known who he was. Years ago, as a brand new lawyer just out of law school, I worked for the state foster care agency. I was assigned to a case which generated significant public attention, in part, because it involved foster parents who were prominent lawyers and allegations of racial discrimination. Standing before me that morning was the former foster mother (now guardian) and the young man who had once been a toddler in my office. He has grown into an admirable young man in a family that loves him deeply. Just as I once imagined.
2. For more information about Global Alliance for Africa, see their website at www.globalallianceafrica.org.
3. Report of the secretary-general on the situation in Rwanda, Doc. S/1994/640 (1994), para. 43.
4. To date, only 45 cases have been completed since the tribunal was established. ICTR Detainees Status - July 14, 2009 at www.ictor.org/default.htm.
5. For more information about Amani, please see their website at www.amanikids.org.
6. For more information about Mkombozi, their work, and their lawsuit, please see their website at www.mkombozi.org.
7. For more information about Cradle of Love, please see their website at www.cradleoflove.com.
8. For more information about the Green Door Home and the Boona Baana Center for Children's Rights, go to www.boonabaana.org/green_door_home.htm.
9. SOS Children's Village is a worldwide organization and operates children's homes all over the world. For more information, please see their website at www.soschildrensvillages.org.uk/sponsor-a-child/africa-child-sponsorship/tanzania.htm.
10. Makumira is located in Usa River, about 15 miles outside of Arusha. The college is part of Tumaini University - the national university for the Evangelical Lutheran Church in Tanzania. For more information, see their website at www.makumira.ac.tz/home.html.
11. Lewin, Keith, *Strategies for Sustainable Financing of Secondary Education in Sub-Saharan Africa*, World Bank Working Paper No. 136.
12. For more information about the law school, please see their website at www.uovs.ac.za/faculties/index.php?FCODE=03.
13. www.unicef.org/southafrica/reallives_4265.html.
14. Convention on the Rights of the Child, Article 21.
15. I think the "up-river" and "down-river" metaphor comes from a parable about children drowning in a river. The story is about an entire village of people who rush to the river's edge to rescue drowning children as they float down the river. One man refuses to help. As he is walking away, a second man asks how he can abandon the drowning children. The first man answers that instead of pulling them from the river, he is going up-river to prevent them from falling in in the first place.

A Tribute to Robinson O. Everett, North Carolina's Citizen Lawyer

BY JAMES C. DEVER III

George Wythe was a lawyer and one of seven Virginians who signed the Declaration of Independence. Wythe also served as a delegate to the Constitutional Convention, mayor of Williamsburg, speaker of the Virginia House of Delegates, a judge of the Chancery Court of Virginia, and the first law professor in the US.



Wythe's students included John Marshall, Thomas Jefferson, and James Madison. To many in the legal profession, George Wythe epitomizes the phrase "citizen lawyer." On June 12, 2009, North Carolina lost its version of George Wythe when Robinson O. Everett died at age 81. As one of Everett's former students, colleagues, and friends, I was privileged to work with this exceptional teacher, scholar, military officer, judge, lawyer, entrepreneur, family man, and citizen. He had a towering intellect, indomitable energy, and disarming humility. He was North Carolina's quintessential citizen lawyer.

Robinson Oscar Everett was the only child of two prominent North Carolina attorneys: Kathrine Robinson Everett and Reuben Oscar Everett. Kathrine Robinson Everett was a pioneering lawyer, who graduated first in her class in 1920 from the University of

North Carolina School of Law and received the highest score on the 1920 North Carolina bar examination. After graduating, Kathrine Robinson began practicing law with her father in Fayetteville, North Carolina. In 1924, Kathrine Robinson met Reuben Oscar

Everett at a meeting of the North Carolina Bar Association. At the time, Reuben Oscar Everett was a prominent trial lawyer in Durham. In 1926, Kathrine Robinson married Reuben Everett, and they began practicing law together in Durham. Robinson

Everett arrived on March 18, 1928.

As a child, Robinson Everett excelled at everything that he attempted, particularly academics. At age 15, he graduated from Durham High School. He then took statewide examinations in four subjects: mathematics, Latin, history, and physics. He was competing against all North Carolina high school seniors and received the highest score in the state in mathematics, Latin, and history, and the second-highest score in physics. Because Robinson was only 15 when he graduated from high school, he then attended Phillips Exeter Academy for one year, where he continued to excel aca-

demically. At age 16, after a summer studying at the University of North Carolina, Robinson Everett enrolled at Harvard University. In 1947, at age 19, he received his AB in Government *magna cum laude* from Harvard. While at Harvard, he also played on the basketball team and was elected to Phi Beta Kappa.

In the spring of his senior year, Everett was accepted at Harvard Law School. In 1950, at age 22, Everett graduated from Harvard Law School and received his L.L.B. *magna cum laude*. He ranked fourth in a class of 455 students and was an editor of the *Harvard Law Review*.

After graduation, Robinson Everett returned to Durham, passed the North Carolina bar exam, and began practicing law with his parents. The firm was renamed "Everett, Everett, and Everett," although Robinson referred to the firm as "Mother, Dad, and Me." In 1950, Robinson Everett also joined the faculty at Duke Law School. Only age 22 at the time, he remains the youngest person ever appointed to the Duke Law School faculty.

In 1951, in the midst of the Korean War, Everett volunteered and enlisted in the United States Air Force as a private. He served on active duty for two years in the

What Judge Robinson O. Everett Taught Me About Being a Lawyer

NATHAN S. CHAPMAN

The first lawyer I worked for was perhaps the best one I'll ever know. I had just finished a year at Duke Divinity School and was preparing for my first year at the law school when a friend suggested I ask Robinson Everett about a summer job. I told Judge Everett that my kin were all preachers and teachers, and that I was not convinced I was a good fit for law school. He said, "I'm not sure why, but it seems like the right thing for you to work for me this summer." We agreed he would pay me \$3,000 for the whole summer—just enough to persuade my wife I didn't need a second job. In retrospect, I've never been more overpaid. By summer's end, Judge Everett had shown me more about serving a community as a lawyer than I could learn in a lifetime of scholarship. A few stories in particular bear repeating.

Lesson I—Judge Everett had a church friend who periodically consulted him on legal matters. One day he called the Judge, fit to be tied about a property dispute with his neighbor. The Judge let me sit in on their meeting. The Judge patiently listened to the client's story. While landscaping his yard, the client had cleared a large, unsightly, 100-year-old live oak. The trouble was this: the tree was in his neighbor's yard. The neighbor had not taken the news well. He pitched a fit, hired a surveyor, and threatened to sue.

The surveyor confirmed that the tree had, in fact, been in the neighbor's yard, and now the client was ready to fight a lawsuit on the ground that tearing down the tree was an aesthetic improvement. Mostly, I think, he was just mad at his neighbor's response, ashamed at his own mistake, and a bit too proud to make amends.

Judge Everett's first question was, "Have you talked to John?" The client looked down and muttered something like, "Why would I talk to John?" It became apparent from the ensuing conversation that John was the Judge's and the client's pastor. I'm not sure what John would have said to the client, but based on the client's response, I think he did. So after about 45 minutes of background facts that had been punctuated by unreasonable vitriol and self-serving gloss, it took only one question and a couple of minutes of conversation before the client was prepared to move on—to confirm the property line, to pay for the tree, and to help his neighbor build a fence.

The meeting taught me a few lessons about a lawyer's role. First, a lawyer can often do the most good by encouraging a client to mend a relationship, if possible, rather than exacerbate a conflict by turning it into a legal dispute. This takes patience, tact, and helping the client to remember the big picture. In this case, it took reminding the client that he had responsibilities (to his neighbor) and a

community (his church) that called him—and gave him the necessary support—to let go of his pride. Indeed, lawyers do well to remember that clients are more than the sum of their legal claims. They have itches that money can't scratch, and they have an array of vices and virtues. A wise legal counselor steers them in the direction of their virtues and encourages them to a better life, not just a better legal position—one that puts forgiveness, responsibility, and hard work into operation with justice.

Lesson II—By that summer, the sun was setting on Judge Everett's career, but his prodigious advocacy skills were still apparent. Though he was prone to nap through meetings, and though he kept an enviable pace for a 77-year-old, he was not at full steam. Still, he was a picture of southern bonhomie, and behind his warm, ever-present smile, his mind was a polished diamond. He could go from Matlock to Oliver Wendell Holmes in a Carolina second. For instance, upon receiving a call from a reporter on point of military law, he instantly recalled the relevant code sections and case names, quoting passages from memory.

His mind shone brightest, though, in court. We spent much of the summer preparing a client's auto collision claim for trial. Our liability claim was strong, but the insurance company dragged its feet on a settlement, in part because it doubted our dam-

Judge Advocate General Department in Washington, DC. Following his release from active duty, Robinson remained in the air force reserve. In April 1978, he retired as a colonel in the Judge Advocate General Corps.

After completing his tour on active duty, Everett returned to Durham and resumed practicing law with his parents. Initially, he also taught part-time at Duke Law School. In 1956, he published the textbook *Military Justice in the Armed Forces* and was immediately recognized as one of the nation's leading scholars on military justice.

In 1957, Robinson Everett accepted a full-time appointment to the faculty at Duke Law School. Not content simply to teach, he received an L.L.M. degree from Duke Law School in 1959. In 1967, Duke Law School awarded him tenure. From 1957 until his death in June 2009, Robinson Everett taught continuously at Duke Law School. He taught criminal law, criminal procedure, national security law, military justice, sentencing, and land use planning. As Dean David F. Levi of Duke Law School has noted, Robinson Everett taught over 97% of all living Duke Law School alumni. Dean Levi accurately

observed that, "For so many Duke Law alumni, Robinson Everett is Duke Law School."

While a professor at Duke Law School, Everett published articles on criminal law, criminal procedure, military law, national security law, academic freedom, appellate advocacy, election law, government contract law, redistricting, real estate law, radio and television law, and secured transactions. Additionally, while on the faculty, Everett served (at times) as the faculty advisor to the *Duke Law Journal*, *Law & Contemporary Problems*, and the Moot Court Board. He also served on countless law school and university

ages and in part, I suspect, because they wondered how much Judge Everett had left in the tank. The case made it as far as a pre-trial hearing, my first experience in court. When the court asked for opening remarks, Judge Everett slowly rose. His voice, as if by a conjurer's trick, instantly grew to fit the large courtroom. Without a jot of notes or a wasted word, he methodically laid out the plaintiff's case. That was the first time I experienced the beauty and power of a legal argument expertly presented. And Judge Everett was a master. Within an hour we were toasting a favorable settlement with sweet tea and hushpuppies.

I learned that the goals of serving the court and serving a client are indistinguishable. Nothing is more helpful to the court or to a client's case than the sort of clarity, precision, and brevity that only diligent preparation and honesty can offer.

Lesson III—I wasn't the only one working with Judge Everett that summer. He was surrounded by a cast of characters only real life could bring together: (1) a middle-aged, second-career Duke Law grad who practiced real estate and elder law part-time; (2) a newly-minted Carolina grad trying to scrape together an education law practice; and (3) a middle-aged attorney who worked largely from his home in Greensboro after an illness had ended a promising DC career. They each worked out of the Judge's offices (I don't know if they paid rent), and traded on the Judge's good name.

Only the third lawyer could be said to be working for the Judge, and so I had the privilege of working some with him. I'll never know what sort of lawyer he was in his

youth, but in his illness he was a challenge to work with. He had great difficulty focusing for even short periods, was prone to debilitating exasperation over minor errors while seemingly unaffected by significant problems, repeated himself ad nauseam, and in general was unburdened by basic communication skills. He was, by any reasonable estimate, more of a liability than an asset. And he knew it. Even though he grew impatient and frustrated with his own disabilities, he had the strength to be honest about himself and generous with others. In this regard he is one of the most inspiring people I've known. But that didn't make him easy to work with. Judge Everett patiently made time and space for his idiosyncrasies, found opportunities to laugh with him, and, perhaps most importantly, gave him work. He treated him as a person and not a liability.

Most of Judge Everett's colleagues had a story to tell of how he had thrown them a lifeline at a moment of vulnerability. I don't know what he was like as a younger man, but I know that, at the apex of a profession that all too often sees leverage as greatness and networking as friendship, Judge Everett consistently put his time, money, and reputation on the line to remove hindrances for those who could not possibly repay him and whose association would have been perceived by many to threaten their career and credibility. He thus demonstrated that there is no sphere, public or private, professional or leisure, that kindness and generosity cannot invade—and reform—if one is only willing to make the extra effort and run the risk. Those sorts of commitments might not make much sense to "the market"—meeting

human need is rarely efficient as economists use the term—but it's hard to see how taking the time and energy to care for colleagues wouldn't make our communities stronger and our legal system healthier.

Lesson IV—That summer Judge Everett became the second recipient of the North Carolina Bar Association's Judge John J. Parker Memorial Award, a lifetime achievement award. Even I, in my ignorance, realized that it was a pretty big deal. At some point he brought the award into the office, but I don't know what happened to it after that. He didn't make much of it. The Apostle Paul admonishes Christians to evaluate their lives with sober judgment, to not make too little or too much of themselves. I've seen a lot of folks minimize their accomplishments out of feigned humility, or because they are convinced that nothing could ever be good enough. Other folks deny themselves enjoyment of their successes as self-punishment for some private failure. Maybe Judge Everett fell into one of those categories, but I don't think so. Instead, if you listened to those who loved him and those whose lives had been touched by him, it became clear that the sort of life's work that merits the Judge Parker award is its own reward—especially when, like Judge Everett, you've got the humility and good sense to enjoy the ride. ■

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committees. During his teaching career, Everett also found time to teach seminars at the University of North Carolina School of Law and the Wake Forest School of Law.

As a teacher, Robinson Everett was the antithesis of the fictional character Professor Kingsfield from the *Paper Chase*. He was not only clear and kind with students in class, but also generous with students outside of class. He never seemed to be in a hurry and always took time to answer questions and give encouragement. He knew all of his students by name and frequently ate dinner with his students in his home or at Bullock's Bar-B-Cue. Moreover, he remained friends with numerous students long after they graduated. Indeed, one former student described walking with Everett from the Duke Law School to Cameron Indoor Stadium to attend a basketball game. The former student noted that everyone at Duke seemed to know Professor Everett and everyone wanted to stop and speak with him. He was a role model who revealed—in how he lived his life—that a person could be both a great teacher and a great person.

I graduated from Duke Law School in 1987. While a student, I saw first hand Everett's excellence as a teacher. He knew and explained both the theoretical and the practical. Like many other students, I also had dinner with Robinson at his home with his family. Following graduation and a federal clerkship, I remained in touch with him while serving on active duty in the air force at the Pentagon. As my time on active duty was ending, I spoke with Robinson about my desire to return to North Carolina. He immediately prepared a list of firms and contact information identifying a "former student" at each firm. As it happened, each "former student" happened to be the managing partner or on the management committee at each firm. As a result of Everett's

counsel, I joined Maupin Taylor & Ellis in Raleigh in 1992.

Robinson was kind enough to speak at my investiture as a United States District Judge in 2005. Ever the southern gentlemen, he wrote me a note after the ceremony thanking me for inviting him to attend and wishing me all the best in my judicial service. Classic Robinson Everett. He does me a favor and then says thank you.

In 2008, we taught a seminar together at Duke Law School on sentencing and punishment, and in 2009 we taught criminal procedure together. Robinson loved preparing for class and teaching. At the end of each course, we would walk back to his office. He always wanted to discuss how we could improve "the next class." This attitude reflected his perpetual quest to look forward and to seek improvement in all that he did.

Everett did not limit his service to teaching. From 1961 to 1964 he served as counsel to the Subcommittee on Constitutional Rights of the United States Senate Judiciary Committee and continued to consult with the committee from 1964 to 1966. Working with Senator Sam Ervin, Everett helped to craft the Military Justice Act of 1968, which created the position of military judge and modernized the military justice system.

In 1980, President Carter appointed Everett as chief judge of the Court of Military Appeals. He served as chief judge for ten years, as an active judge for two years thereafter, and as a senior judge until his death. As a judge, Everett wrote judicial opinions on all aspects of military justice. His colleagues on the court (which is now known as the United States Court of Appeals for the Armed Forces) speak glowingly about Robinson's tenure as chief judge and his subsequent service. He loved serving as a judge. In a conversation that we had two days before his death, Robinson described his excitement at a case that he planned to hear as a senior judge in late June. He already had read the briefs and the record and said that he had "a few questions" for the lawyers. As advocates who appeared in his court knew, Judge Everett always got to the heart of a case at the outset of oral argument with "a few questions."

While serving as a judge, Everett often saw cases at the intersection of the Constitution and national security. As a result, in 1993, he founded the Center of Law, Ethics, and National Security at Duke Law School and recruited Scott Silliman to serve as director.

From its inception, the center has been at the forefront of analyzing legal and policy issues at the intersection of the Constitution and national security. True to his visionary nature, Robinson was thinking about and analyzing these profound issues long before the general public had ever heard the phrases "War on Terror," "enemy combatant," or "Guantanamo Bay."

Before and after his term as an active judge, Everett not only taught, but also continued to practice law at Everett, Everett, and Everett. As a lawyer, Robinson practiced both civil litigation and criminal law. His most famous cases as a lawyer are the racial gerrymandering cases from the 1990s. In 1992, the North Carolina General Assembly enacted a congressional redistricting plan that included two majority-black congressional districts. The districts were unusually shaped, including one district that snaked down I-85 from Durham to Charlotte. See *Shaw v. Reno*, 509 U.S. 630 (1993). Everett (as both a plaintiff and a lawyer) challenged the congressional redistricting plan as an unconstitutional racial gerrymander. Although some believed that precedent was against him, in June 1993, the United States Supreme Court agreed with Everett's theory and held that plaintiffs had stated a claim upon which relief could be granted under the Equal Protection Clause and remanded the action for further proceedings. *Id.* at 658.

On remand, I had the opportunity to observe Robinson's skill as an attorney and as a citizen. My law partner Thomas A. Farr and I represented a group of plaintiff-intervenors in the case. In that role, our firm litigated alongside Everett. He was an exceptional advocate and worked tirelessly (including many nights and weekends). Ultimately, the United States Supreme Court held that the congressional redistricting plan violated the Fourteenth Amendment because the plan was not narrowly tailored to serve a compelling state interest. See *Shaw v. Hunt*, 517 U.S. 899, 902 (1996). In successfully challenging the congressional redistricting plan, Robinson Everett held firm to his belief that such an unconstitutional redistricting plan was not healthy for the citizens of North Carolina or the nation. Some fellow Democrats criticized Robinson for pursuing the case. He ignored the criticism, in part, because as a citizen in Durham he had participated throughout his life in building coalitions.



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tions and working with citizens of all races to improve Durham, North Carolina, and the United States.

Everett also was active in the Durham County Bar Association, the North Carolina Bar Association, the Federal Bar Association, and the American Bar Association. He received the highest honors that the North Carolina Bar Association and the Federal Bar Association awarded. In 2006, the North Carolina Bar Association recognized his exemplary skill as a lawyer when it inducted him into the North Carolina Bar Association's General Practice Hall of Fame.

Of course, Robinson did not limit his activities to the law. He was an entrepreneur who (along with his mother) was a very successful real estate developer. The Everetts also founded and operated numerous television stations throughout North and South Carolina.

Robinson had a deep and profound faith in God and was an active member of the First Presbyterian Church of Durham, where he served in many leadership roles. He lived the adage: "Preach the Gospel at all times. Use words if necessary." He also knew

that "to whom much is given, much is expected." In 2002, he established the Reuben Oscar and Robinson O. Everett Scholarship Endowment at Duke Law School. In addition, following his mother's death, he oversaw a \$14,000,000 gift to the University of North Carolina School of Law and Duke Law School.

Notwithstanding all of his professional accomplishments, if you asked Robinson what the best day of his life was, he would tell you, unequivocally, that it was the day Lynn McGregor married him. Lynn described Robinson lovingly as her "gentle giant." Robinson described Lynn as the best person he knew. Robinson and Lynn have three sons, Rob Jr., Greg, and Luke. Their sons will tell you that they had the best dad in the world. Two of Robinson and Lynn's sons are now North Carolina lawyers. In fact, in 2008, Rob Jr., Luke, and Luke's wife Sherry all graduated from the University of North Carolina School of Law. Rob Jr. practices in Raleigh, and Luke and Sherry practice at Everett and Robinson. Greg is a successful entrepreneur in North and South Carolina. Robinson found no greater joy than spending time with Lynn,

his children, and his grandchildren. He loved them and always let them know it.

In April 2008, Duke Law School awarded Robinson Everett the A. Kenneth Pye Award for his life-long commitment to Duke Law School. At the presentation, I noted that I had known him for 24 years and had never heard him say anything unkind about another person. I also stated (and continue to believe) that Robinson Everett is living proof of the paradox that the more a person gives to this world, the more he receives in return. He spent a lifetime giving to Durham, to North Carolina, to the United States, to his family, to his students, to his faculty colleagues, to his fellow members of the military, to his judicial colleagues, and to his friends. If there ever was a person who is a modern day George Wythe, that person is Robinson Oscar Everett. As citizens and as lawyers, we would do well to emulate Robinson Everett's life and character. ■

James Dever is a United States District Judge in the United States District Court for the Eastern District of North Carolina.

Autism in the Criminal Justice System

BY JUDGE KIMBERLY TAYLOR, DR. GARY MESIBOV, AND DENNIS DEBBAUDT

Autism Spectrum Disorder (ASD) diagnoses are increasing at an alarming rate in North Carolina,

across the country, and around the world. This increase in the incidence of ASD suggests that the criminal justice system (CJS) will certainly see increased contact with



individuals with autism as victims, witnesses, and/or offenders. All criminal justice professionals who have contact with individuals who have ASD need to establish clear and consistent communication methods, verify facts, make appropriate accommodations, and ensure fair justice and consequences for all concerned.

Communications, behaviors, intent, and ability levels of people with autism vary greatly and present challenges for even the most experienced criminal justice professionals. Attorneys and judges must avoid misinterpretation of behaviors and characteristics typical of those with autism since these behaviors and characteristics could be misinterpreted as evidence of guilt, indifference, or lack of remorse.¹

What Is Autism?

Autism is defined as a neuro-developmental disability, meaning that it involves the brain and starts very early in life when the brain is still forming and still changeable. Autism involves differences and difficulties in several areas: social interaction; communication; the presence of narrow, repetitive behaviors; and adjusting to change. ASD occurs more frequently in males than females—usu-

ally a four-to-one ratio. Additionally, there is a wide range in intellectual ability for individuals with ASD where IQs span from below 25 to above 150.

Low-Functioning Individuals

The term "low-functioning" may be used to describe persons with lower IQs. These persons have difficulty with basic life skills such as safely crossing a street, negotiating a

financial transaction, and making sense of social interactions. They typically have a caregiver with them at all times. Oftentimes, these low-functioning individuals are also nonverbal. Those who are nonverbal may use alternative communication such as American or other sign language, Picture Exchange Communications Systems (PECS), or computers that can speak for them.

Although individuals with ASD could commit a criminal offense, their intent to do so could be difficult to determine, questionable in court, and their competency may not reach the level of responsibility for an offense. Also, in most circumstances, individuals would be greatly compromised in their ability to assist in their own defense.

As crime victims rather than criminal offenders, individuals with ASD present the perfect victim. People with ASD have great difficulty communicating details and experiences of their victimization, thus resulting in a lack of credibility in interview and courtroom situations. This reality creates major issues regarding time and resource considerations for investigators and attorneys.

Investigators and attorneys should consider the following accommodations and guidelines in preparation for the victim-witness interview of a person with ASD:

- Interview the care provider, parent, or person who first heard the disclosure of victimization.
- Investigate the possibility of multiple victims by interviewing all persons with whom the perpetrator had contact.
- Review all records of assessment.
- Discover the person's communication strengths and deficits.
- Interview care providers and persons who know the individual with ASD to discover how he or she best receives and provides information.
- Consider videotaping all interviews.
- Plan questioning based on the person's ability level.
- Use the person's first name.
- Speak to adults as adults; children as children.
- Use simple, direct language.
- Deal with one issue at a time.
- Have the individual recreate events in his or her own words—a narrative interview.
- Make sure both your word choice and the individual's word choice have the same meaning to each person.
- Make sure all individuals understand to

whom a pronoun refers when using pronouns.

- Ensure question length is short, direct, and concise.
- Utilize maximum patience, as formulating answers takes longer for individuals with ASD.
- Ask for and get permission before repeating questions.
- Become convinced of the person's ability to tell the truth.
- The person may have short attention span; take frequent breaks.
- Be alert to nonverbal cues indicating the person is confused or does not agree to your statements or questions. Get confirmation through direct questions.²

High Functioning Individuals

"High-functioning autism" or "Asperger syndrome" are terms describing persons who are verbal, may hold jobs, and live semi- or fully independent lives. Currently, no statistics have been developed about the rate of contacts young people on the autism spectrum will have with the criminal justice system, although research indicates that people with autism spectrum disorders and other developmental disabilities will have up to seven times more contacts with law enforcement during their lifetimes than members of the general population.³ While there is no evidence to suggest that they will commit crime at a higher rate than the general population, those that do and can be held responsible for their acts will typically be the more independent, so-called higher functioning persons with autism or Asperger syndrome.⁴

Persons with ASD often get into trouble without even realizing they have committed an offense. Offenses such as making threatening statements; personal, telephone, or internet stalking; inappropriate sexual advances; downloading child pornography; accomplice crime with false friends; and making physical outbursts at school or in the community, would certainly strike most of society as offenses which demand some sort of punishment. This assumption, though valid at face value, may not take into account the particular issues that challenge the ASD individual. Problems with sensory overload, poor social awareness, semantic misunderstandings, inability to deal with changes in routine or structure, and little to no understanding of nonverbal communication, are the very kinds of things that make more appropriate responses to society very difficult

for someone with ASD. For example, what appears as antisocial behavior to the "regular" world is often simply the manifestation of the ASD person's social misunderstandings. While most would see too many phone calls in the middle of the night as aberrant phone stalking, the ASD person might well view the situation as one friend wanting to talk to another, no matter the time or frequency of calls. And a physical outburst at school might well be related to the ASD person's sensory dysfunction, inability to deal with interruptions in the daily routine, or emotional liability. Emotional liability means to be susceptible to change, error, or instability and stems from its Latin roots meaning prone to slip. This often presents itself in individuals with ASD—their emotions can change quickly and they can become upset, scared, or anxious very quickly. They may also be extremely anxious one minute, and then calm the next, or vice versa. So, while the individual with ASD might have committed the offense in question, the intent might well have been anything other than to do harm.⁵

The offender may appear as normal, be more able academically and more independent than a person with classic or low-functioning autism. Yet, these strengths can mask social and communication deficits that go unseen or misunderstood by those with whom they have contact.

Their communication difficulties include hardships in making sense of the verbal and body language of others. Their difficulty in maintaining eye contact or insistence on changing the subject of conversation to a topic of their choice—all typical diagnostic behaviors of a person with autism—can mislead an investigator, attorney, or judge. They may appear to lack respect and be a "rude, fidgety, and belligerent" person who, by nature of his lack of eye contact and evasive conversation, appears to have something to hide. Standard interrogation techniques that utilize trickery and deceit can confuse the concrete-thinking person who has autism or Asperger syndrome into producing a misleading statement or false confession. They can become overly influenced by the friendly interrogator. Isolated and in a never-ending search for friends, the person can easily be led into saying whatever his new friend wants to hear.⁶

What are ASD dilemmas for prosecutors, defense attorneys, probation officers, and judges? Left unexplained, the person's courtroom displays of laughing or giggling, their

loud vocal tone, and aloof body language—also inherent to the condition of ASD—could lead many judges to conclude that this is, indeed, a guilty and remorseless person. Everything in the suspect's demeanor says so. The person may very well have no idea of the effect their behavior is having on a judge, jury, or even his or her own defense attorney. Even the best defense attorney might see guilt in his client's display of behaviors.

During questioning, initial contact, or in a courtroom setting, a person with ASD might display these additional behaviors and characteristics:

- An inability to quickly process and respond to requests, commands, and questions.
- Be a poor listener, may not seem to care about what you have to say.
- Be unable to deduce what others are thinking and why they are thinking it.
- Repeat the words, statements, body language, and mannerisms of the investigator.
- Make statements that seem tactless or brutally honest. If you are overweight, bald, or smell of smoke or perfume, they may bluntly remind you.
- Have difficulty recognizing slang terms, innuendo, colloquialisms, figures of speech, or jokes. Ask, "What's up your sleeve?" and the concrete answer may be, "My arm."
- The ASD person might have difficulty understanding communications such as rolling of eyes, raised eyebrows, and other nonverbal signs of your frustration and disbelief.⁷

Situations can arise for individuals with autism where their logic does not work or where their ability to integrate different sources of information is more limited. Even when it may seem to you that your question is clear, misinterpretations can occur.

What they have trouble doing is conceptualizing—putting together information in complicated situations. So they have trouble with context and figuring out how things get connected and what they mean. They look at one situation, they look at it concretely, and don't always look at it in the context of trying to figure out what would be the different connections in that situation. This can impact legal situations with which you may be involved. One criteria is, what would a normal person do in this situation? A person with autism is not necessarily normal in the way that they process the information and put together the different parts. Thus, that standard may need to be modified a bit in order to understand them. And what is a person who thinks like this per-

son expected to do? And what might they not be expected to be able to do? All of this needs to be considered.

Criminal justice professionals should be aware that a person with autism has less ability to understand verbal communication. The simplest thing professionals can do to be helpful is to speak slowly. Individuals with ASD process information much more slowly than typical people who have their same intelligence level and skills.

Another helpful tool is to always have a pen and paper available. If in doubt, write it down. If they are in doubt, let them write it down. Their visual skills are much stronger than their auditory skills.

Individuals with ASD are a concrete group; therefore, criminal justice professionals must not mistake their concreteness for making a wise-crack. One child with autism was given an intelligence test in which he had to take felt pieces and put them together to make another child's face. The child made a face with a big smile. The child with autism was then asked, "How does the child feel?" and he responded, "Soft." A teenager with autism was asked by a questioner who knew he had recently turned fifteen, "How old are you?" The teen replied, "Fifteen." The questioner then asked, "When was that?" "On my birthday," he replied. Somebody could take this type of response as a wise-crack because most people would understand what the questioner meant. However, very often people with autism have trouble with the context, connotation, and/or the meaning of the sentence. For this reason, professionals must be very direct and very concrete in their language choice when interacting with individuals with autism, and they must never rush to judgment concerning the responses of people with autism. Frequently, their responses seem to be disrespectful, "smart aleck," and off topic, but this behavior is normal for the autism spectrum.

Weak verbal abilities often mask much higher intelligence levels in people with autism. For example, a lot of times individuals with ASD don't understand what a teacher is saying. That gets them into trouble because the teacher thinks they're not listening and not obeying. Very often, to get out of this situation, they'll just agree. As a result, the teacher says, "Do you hear me," Do you understand me?" They don't understand, but they can tell the teacher is getting annoyed. Finally, they just say, "Yes." They have learned that an affirmative answer gets them out of

the situation. Thus, in interview settings, the effects of pushing too hard or too intensely for answers will generate affirmative answers from individuals with autism which do not necessarily reflect any truth.

People with autism have reported that it is really hard for them to concentrate and understand what they are saying when they are looking directly at somebody. Many people in society see this as rude behavior. A judge or attorney who asks questions and then observes that the person with autism is looking off into the distance may assume this reflects a lack of respect. In reality, this is normal behavior for the individual. When interviewed, one young man with autism made the point, "I keep telling people 'I'm looking at you. I'm looking at you. I'm looking at you. I'm looking at you. I don't understand a word that you're saying, but I'm looking at you. I'm looking at you.'" And some people with autism have actually said, "You can have your choice with me. You can have me look at you or you can have me understand what you're saying. I can't do both."

Interview/Interrogation Techniques

So, what can the criminal justice professional do to prepare for interactions with persons with ASD? Try to avoid jumping to conclusions or making attributions based on unusual or "inappropriate behaviors." Remember that autism is a social impairment. A component of the social impairment is that individuals with autism may appear to be impolite or disrespectful.

Criminal justice professionals who interact with and question people with autism or Asperger syndrome will enjoy the best opportunity for success by incorporating the following strategies:

- Approach in a quiet, non-threatening manner.
- Talk calmly in a moderate voice.
- Do not interpret limited eye contact as deceit or disrespect.
- Avoid metaphorical questions that cause confusion when taken literally (i.e., a hard time, Are you pulling my leg?, Cat got your tongue?, What's up your sleeve?, spread eagle, or You think you are cool?).
- Avoid body language that can cause confusion. Be alert to a person modeling your body language.
- Understand the need to repeat and rephrase questions.
- Understand that communications will

take longer to establish.

- Use simple and direct instructions and allow for delayed responses to questions, directions, and commands.

- Seek assistance from objective professionals who are familiar with ASD.⁸

The interviewer should develop a plan of action that incorporates patience and persistence on his or her part. The interviewer is interacting with somebody who might not always get the message, question, or concept straight. Much patience is necessary because impatience may make them very anxious. They really do want to please; they just don't know how to do that all the time. But they can sometimes tell if they're doing it successfully or not. Therefore, practice patience in all situations when dealing with individuals with autism or Asperger syndrome. Interviewers must understand they will not necessarily get the answer the first time or during one modality of questioning because of the person's understanding of the context, and your speed and pacing is going to affect it. They are inconsistent processors sometimes. So, they might understand one question perfectly well and then understand the next question not at all. Sometimes interviewers may have to write something down or draw it out and let them look at it. The key is being patient so you don't get them emotionally aroused and upset. Being supportive and continuing to try different methods of communication will help the person with autism to answer in a way that can be understood and make sense to all involved parties.

Environmental Accommodations

People with autism may have more difficulty in that they are overstimulated by the sensory environment—the sights and sounds that will distress them. Noises are louder for them. Normal background noise that may seem negligible to the average person can be completely overwhelming or overpowering to this population. When this occurs, not only can they not hear what people are asking them, but they can sometimes become very anxious and even terrorized by the situation or by the noise.

Additionally, lights are often brighter for those with ASD. For example, when a person with autism is outside on a sunny day—which in North Carolina most of us love—the light may be very overstimulating, like somebody shining a very bright flashlight right in their eyes. Therefore, in many environments, the lighting itself causes distress.

Intense sensitivity can extend to any of the senses and interrupt functioning on many levels. Many very capable people with autism will score high on an IQ test, but can have horrible school records. The common noise, disruption, and movement in a typical classroom can be so disruptive that they cannot focus on that one thing in the classroom on which they are supposed to focusing. The same situation may exist in a courtroom or interview room.

As a result, adjustments in the environment can be crucial to a successful interview. Consider making accommodations to the sensory environment when interacting with a victim, witness, or offender who has autism or Asperger syndrome. Keep lighting low; use subdued colors; limit distracting images or pictures; eliminate the presence of non-essential personnel; avoid using perfume, aftershave, or scented soaps; and avoid touching the person with autism.

Sentencing Considerations

In those cases where it has become clear that the person has committed the crime and qualifies for a diversion or probation program, the offender may be further stymied by his autism. Traditional options might include group therapy with other offenders. Meeting with strangers, group discussions about personal feelings, sharing personal information or contributing comments about others may be difficult conditions for the person with ASD to meet.⁹

Corrections professionals can find success with the ASD population when they create diversion or probation programs that:

- Use language and terms the person will understand.
- Avoid the use of technical terms.
- Involve persons who the individual knows and trusts.
- Describe (use photographs) beforehand the persons the individual will work with and venues in which they will meet.
- Assure the individual that the new persons are safe.
- Utilize the individual's strong rote memory skills.
- Teach the rules of program with visual aids.
- Use pictures to describe actions and situations.
- Create a chronological list of the program, develop a poster with bullet points.
- Discover what is important to the person with ASD. Avoid trying to make them fit into

what is important to you.¹⁰

If an individual with autism is taken into custody, alert jail authorities. This person may be at risk in the general jail population. For short-term custody, consider segregation, monitoring, and a professional medical and development evaluation.

Incarceration will be fraught with risk for the person and anyone in contact with him or her. Their direct manner, offbeat behaviors, and characteristics may be read by other inmates as an invitation to exploit and control. Corrections professionals may see a rude, incorrigible person. Good behavior privileges will be hard to earn. Correctional professionals who work with the incarcerated ASD population will benefit greatly from comprehensive training, at the least a good briefing and access to ongoing assistance from a professional who is familiar with autism.¹¹

Conclusion

Some people have described autism as a culture. Consider the need for a translator when dealing with a person who speaks little or no English. Working with someone with autism is analogous to that situation in that successful communication is blocked, but not as easily overcome. Autism, as a culture, is an analogy that emphasizes the very different ways the affected person processes information and understands things—very much as people from different cultures view things differently.

We are obligated by our profession to understand that those cultural differences may loom larger in a person with autism than most cultural differences stemming from language, tradition, or history. The cultural differences of autism come from the way the brain actually works, requiring a total difference in understanding and perception. Our role becomes one of translator. The quality of our translation is dependent upon our resourcefulness, knowledge of autism, patience, and understanding. We can and must meet the challenges of this growing population by embracing our roles in the process.

Consider utilizing as a resource an objective autism professional who can act as a "friend of the court." This person can help interpret the behaviors and communications of persons with autism and can help people understand what the person with autism understands. He or she can also advise about the impact of the language the questioner is using. Each case will be different, each fact pattern is different, and the ability of people

Joint Legislative Study Committee on Autism Spectrum Disorders

Citizens with autism should feel safe, understood, and supported in their communities by public authorities who protect and serve them in the same ways as the general population. That has not always been the case.

As a result of a tragic case in Statesville, North Carolina, involving a low-functioning man with autism who tragically died while in custody of the police, a Joint Legislative Study Committee on Autism Spectrum Disorder, Law Enforcement, Public Safety, and First Responders was established in 2005 and reappointed in 2007 by the president pro tempore of the Senate and the Speaker of the House of Representatives. The committee was authorized to study the availability and appropriateness of autism-specific training and education for law enforcement personnel, community colleges, public safety personnel, first responder units, judges, district attorneys, magistrates, and related organizations.

The charge of the committee was to make recommendations to the General Assembly based on their findings. Several recommendations were adopted and implemented; additionally, the General Assembly appropriated a grant to fund a training video to raise awareness of autism within the judicial system.

The article in this edition of North Carolina State Bar *Journal* is written to supplement the information and illustrations of the video *Autism In The Criminal Justice System*, which was produced for use by the University of North Carolina School of Government and other legal organizations in consultation with UNC Division TEACCH (The Treatment and Education of Autistic and Communication-Handicapped Children), UNC School of Medicine, Carolina Institute of Developmental Disabilities, to develop continuing legal education training regarding the identification, safety, and needs of those with autism in their communities.

For more information and to view *Autism in the Criminal Justice System*, please visit www.lewisdaggett.com/autismawareness. ■

with ASD to form intent and to control actions certainly differs from one individual to the next. All concerned parties should consider choosing an expert who can both interpret and testify in court if needed. There are so many things in life that the person with autism can misunderstand even though they are trying hard and doing their best. The world is just complicated for them. ■

Kimberly Taylor is a retired resident superior court judge for the 22nd Judicial District. She is

also a national board member of the Autism Society. Her middle son was diagnosed with autism at age three.

Dr. Gary Mesibov is a professor of psychology in the departments of Psychiatry and Psychology at the University of North Carolina at Chapel Hill. He has also served as director for the past 16 years of Division TEACCH, North Carolina's state-wide program serving children and adults with autism and their families. He has 35 years of professional experience working in the field of Autism Spectrum Disorders (ASD).

Dennis Debbaudt is the proud father of Brad, a young man who has autism. A professional investigator and law enforcement trainer, Dennis has authored or co-authored over 30 autism safety-related articles and books including Autism, Advocates, and Law Enforcement Professionals: Recognizing and Reducing Risk Situations for People with Autism Spectrum Disorders and Contact with Individuals with Autism. Debbaudt is co-producer of the Autism in the Criminal Justice System video.

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Access to Civil Justice (cont.)

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12. See, *Shеды v. Merrimack County Sup. Ct.*, 509 A2d 144 (NH 1986).
13. See, N.C. Gen. Stat. 7A - 451 (a)(parole, involuntary commitment, incompetency, parental rights, abuse, and neglect, etc.).
14. See, *Wake Cty. ex rel Carrington v. Townes*, 293 SE 2d 95 (1982); *In re HB*, 644 Se2d 22 (NC App., 2007); *State v. Adams*, 483 Se2d 156 (1997); *In re Pittman*, 561 SE2d 560 (2002); and *King v. King*, 547 SE2d 846 (NC App. 20010).
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Under and By Virtue

BY LANCE P. MARTIN

"Under and by virtue of the power of sale provision contained in that certain Deed of Trust . . ." Why is it always a certain deed of trust, wondered the lawyer as he read the Notice of Sale in a halting, almost embarrassed monotone sandpapered of all unnecessary inflection. You never see an uncertain deed of trust or a somewhat certain deed of trust, he thought. If it's a deed of trust, you can't bet it's certain. That's for certain.

The lawyer, with the banker next to him, stood at the top of concrete steps flecked with pigeon droppings and cigarette ash. Some fading graffiti in a corner suggested the Lascaux cave paintings, if those cavemen had been inspired by malt liquor instead of horses. In theory, he belonged on the steps to the front door of the courthouse, but the actual front door was really a side door with a metal detector. This side alcove had become, by custom, the designated spot for public sales. It also doubled as the smoking area. Jurors, defendants, and court staff lingered around the periphery and leaned on columns and puffed. The tobacco smoke hung thick as cotton candy—nicotine-flavored, carcinogenic cotton candy—as the lawyer continued to read aloud. In the distance, a young deputy twittered.

"Thence continuing with the centerline of State Road 1112, South 10 degrees 54' 23" West 55.03 feet to a P.K. Nail..." Now deep into the fourth paragraph of the legal description, the metes and bounds and the second-hand smoke conspired to dry his throat. It was only 10:30, but already the temperature approached ninety degrees. The sun found him wherever he stood in the alcove, and the sweat saturated his undershirt and oxford and now advanced, like a matinee monster, into his wool suit. Sweat beads plopped onto the Notice of Sale, blurring one of the calls. But he had already read that part.

"Hey? Let me ask you something." A member of the audience had brushed the

banker aside and approached him. He did not look like he was there to place a bid.

"I'm in the middle of a foreclosure sale, sir. What is it?"

"You a lawyer?"

"Yes, I am a lawyer." Here we go, the lawyer thought to himself.

"Take a look at these papers." He pulled a tri-folded stack of papers from the back pocket of his jeans. They were crumpled and looked like they had been in that back pocket for the ride over. "Careful, they are the originals."

"Sir, I can't look at that right now. I have to finish this sale."

"Alright, I can wait." He moved back into the gallery and took another cigarette from someone named Charlene.

"Beginning on two blackgums, running North 57 1/2 East 18 poles to a stake..." The lawyer was getting more hoarse with every word and bound.

Pressing on with tonsorial endurance, the lawyer, as if he were narrating the side effects in a drug commercial, disclaimed every warranty and representation imaginable to anyone who would listen. As-is, where-is. Some restrictions may apply. May or may not actually be real estate—might be a slow-rolling double-wide. Void where prohibited. Sorry Swain County. The humidity was thick, almost as thick as the air of self-pity engulfing the lawyer as he read and ruminated on his situation. A year ago, he was not sweating through his handsome collection of wool suits, except when he went to a fancy Thai lunch on the client's tab. He would not be a hard two hours' drive from Charlotte. He would not be conducting his first of three foreclosure sales in a single day, would not be reading Notices of Sale to stragglers, if he was lucky, or more often to no one but the pigeons. If a tree falls in the woods and no one is there to hear it, does it still make a sound? If a Notice of Sale is read on the courthouse steps and no

The Results Are In!

This year the Publications Committee of the State Bar sponsored its Sixth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of eight committee members. The submission that earned second prize is published in this edition of the *Journal*.

one is there to hear it, does it still count under Chapter 45?

"Hey, how much of that TARP money did you get?" shouted someone from the crowd. The banker went pale, the lawyer kept reading.

Back then, he spent his days in a LEED-certified, climate-controlled office on one of the higher floors of one of the higher buildings on one of the pricier blocks of downtown. He worked with deeds of trust every day, though he never actually saw one. He was part of one of these capital markets departments—there were many in the city—who helped the big banks sell their real estate-secured loans on the market. He hadn't studied the subject in law school and didn't quite understand how it worked. Credit-default swaps. Derivatives. Synthetic collateralized debt obligations. It was a different world and a different language? What is the leading cause of injury among capital markets attorneys? Tranche Foot. That joke killed in section meetings. He just kept generating the form documents that turned all those loans, from sub-prime to prime-time, into something like seven-layer dip, then sold off each layer to those parties who liked the price for the salsa or guacamole. No problem with the concept, except that he was part of a system that sold the refried beans as Kobe beef, the sour cream as crème fraîche. But he never

really thought about it until the end. The flow of paper never stopped and the salary kept him in those expensive suits, the kind that lack the breathability required for outdoor duty on North Carolina summer days. It had to make sense to somebody or they wouldn't be doing it, right?

It was only when the end came, and it came suddenly, his practice section folding faster than an all-vegan restaurant in Lenoir County, that he reflected on that seven-layer dip. And he concluded that maybe those refried beans were only refried beans after all. The firm who had given him a summer associate position as a 1L and 2L and then hired him right out of law school now gave him two weeks pay and told him he could fill a box with office supplies. Some restrictions did apply—no computer equipment. He had no job and a dubious future in a fallow job market, but at least he had a lifetime supply of Post-It notes. Four months later, after being turned down by every other law firm in the state ("It's not you. It's us."), he took a contract position for a foreclosure mill, covering hearings and sales for \$50 a pop.

The lawyer kept reading. He looked over at the banker and noticed that he had a button on his chest with a slogan lauding the virtues of his employer—something about loyalty and commitment. The button masked the embroidered logo of his former employer—a competitor bank.

The car, an American model soon to be discontinued, must have once been a glittering lipstick pink but now was on the softer side of Pepto-Bismol, coated in dust, and pimpled with dents. The driver, a former Mary Kay saleswoman once given the "franchise tag" by the tri-county region, slammed it with brake-screaming fury into a handicapped parking spot a few paces from the aforementioned alcove used for public sales (and smoking). In a single fluid motion, she uppercut the gear shift into park, yanked her kid from the back seat, and exited the vehicle.

"Stop!" she cried, toddler on hip, eyes on lawyer, high heels on hot concrete. "Don't let him take my house!"

The banker, who had receded to the back of the alcove, looked at the lawyer and spun his finger rapidly. It could mean only one of two things: either he was trying to flick off a particularly sticky booger or he wanted the lawyer to read faster. The lawyer dove into the final paragraphs of the notice like an auctioneer, plowing through the sentences. Damn the

punctuation, full speed ahead, he thought. He was fast but not fast enough.

"Stop! Someone please stop him!" The owner had reached the alcove. She was panting and red-faced, like a television minister with a little extra mascara. She wore a short skirt and V-necked blouse the way a sausage wears casing. She was older than the lawyer by at least 20 years and looked like she could body-slam him off the top turnbuckle without letting go of her kid. She stepped into the lawyer's personal space, then addressed the crowd:

"This man is trying to steal my house!"

The lawyer turned to the banker for guidance. The alcove was empty. In the distance, tires squealed.

"Ma'am, I'm just doing my job," the lawyer said.

"You should be ashamed of yourself, you filthy thief!" she yelled for all to hear.

"Ma'am, the bank has an order..." the lawyer stopped in mid-sentence as he noticed the crowd closing in on him.

"How can you live with yourself?" she continued. "How can you take my house from me? How can you take this child's house?" Here she squeezed the child's cheeks for effect. The child clung to her like a koala, a koala in a eucalyptus grove that was being clear cut.

"Let's get this sucker!" said a bystander. "Charlene, hold my papers."

"Ma'am, you have the right to redeem..." the lawyer said.

"Oh, redeem this," the owner cried, clutching a part of her anatomy in a way that was entirely inappropriate for viewing by the child or the lawyer. "I put my heart and soul into that house and for what? So you could just steal it from me the first time I miss a payment."

"Actually, ma'am, you never..." the lawyer implored, even as he retreated slowly towards the back wall of the alcove.

"You just gonna kick her out into the street?" asked someone in the crowd with a sudden interest in the plight of the homeless.

"Yeah, what about the kid?" asked a maternal type, just before she blew cigarette smoke into the kid's face. "Don't you believe the children are our future?"

"Have you complied in all respects with the Emergency Program to Reduce Home Foreclosures?" asked Charlene without looking up from a back issue of *US Weekly*.

The crowd was rapidly turning into one of those mobs you see only in Frankenstein mon-

ster movies or political rallies, and the lawyer knew that soon some opportunistic street vendor would start offering a two-for-one special on tar and feathers. But the lawyer didn't go to a first-tier law school (and he had the student loan payments to prove it) for nothing, and in that moment he drew on all his training and savvy and said: "Hey look over there! Is that Dale Earnhardt Jr.?"

And then, in the one to two seconds when the crowd, including the little Koala-clinging toddler, turned (and turned back, teeth bared), he inhaled as if he intended to swim Ocracoke Sound underwater and slurred as fast as his tongue would allow: "Do I hear any bids? The trustee bids on behalf of the bank the sum of \$425,000. Do I hear any other bids? Going once, going twice..."

"Ouch!" The lawyer screamed. Something had plunked him on the cheek. A few more small projectiles came sailing his way, one catching him in the forehead. "What is that?"

"Hit him again!" the owner told her son, and her son's little chubby arm obliged with a side-arm delivery.

The lawyer sidestepped the incoming object and looked down at his feet. "Are those Monopoly houses?" he asked.

"They hotels, you imbecile," said a bystander. "They red, can't you see?"

"Break it up!" The deputy had stopped twittering and come to the rescue. On cue, the crowd dispersed back into pairs or singles, copping another smoke, looking at their papers, shooting the lawyer a menacing look. The owner cried loudly, with intermittent fits of spasmodic sobbing. The child began to wail as well. The lawyer noticed a red whelp on the toddler's leg that suggested a pre-wail pinch.

The deputy asked to hear both sides. The lawyer put on his case. Loan secured by Deed of Trust. Default. Demand. No response. Notice. Hearing. Order allowing Foreclosure. More notice. Publication. Sale. The owner dabbed at her teary eyes and said that the house was her life, and if the bank took it, she would have nothing. The deputy ruled that the sale would have to be postponed. The lawyer took an immediate appeal challenging the deputy's jurisdiction. The appeal was heard by a one-judge panel consisting of the deputy. He upheld his ruling. When the deputy then denied the lawyer's petition for discretionary review, the lawyer conceded defeat. He put his papers in his briefcase and headed for his

car. Looking at his watch, he saw that he would not have time for lunch before his next sale two counties over.

As he walked away, he heard a by-stander shout: "Hey! You promised to look at these papers."

Back in the alcove, the owner thanked the deputy.

"My pleasure, ma'am. Just trying to help. Hate to see you lose your house."

"Well, I do appreciate it." The tears were gone.

"Is it just you and the child living in the house?" the deputy asked.

"Oh no, we don't live in the house. It's just a spec house I'm trying to flip. I got about a

dozen of 'em. Can you believe this market? Say, do you own or do you rent?" ■

Lance Martin is a creditors' rights and bankruptcy attorney in the Asheville office of Ward and Smith, PA. When he is not practicing law, he is either running or cooking, or writing about the tension between the two.

President Interview (cont.)

not only our present needs, including the needs of the Board of Law Examiners and the LAP program, but will also have ample room for growth as our regulatory functions increase over the coming years. The new building will also allow the State Bar Council to hold its quarterly meetings in the facility rather than in hotel space which, of course, is expensive. In addition, we are striving for LEED certification, which will allow us to operate in a "green" and efficient manner. Overall, I believe we will see an extremely favorable return on our investment.

The construction will be financed through the sale of our existing building, cash reserves, and member dues. While many unknown variables can affect projections, we currently believe that a further dues increase will not be necessary for at least five years. Our Facilities Committee is investigating all possible financing avenues, including the sale of tax-exempt bonds, to minimize the burden on our members. All aspects of this project are being directed by a dedicated Facilities Committee, chaired by Keith Kapp. We have been fortunate to have the help of volunteers/advisory members from outside the council who have guided us through the selection of an architect, financing issues, and contract negotiations. We are very grateful to Leslie Silverstein, Mary Nash Rusher and Tom Davis for the substantial amount of time they have devoted to this project over the past year. We are delighted that Glenn Dunn will be soon joining the committee as an advisory member.

Q: In connection with the State Bar's new headquarters, the council plans to establish a foundation to accept contributions from various entities and individuals. How will this work, who will be involved, and who will be solicited?

At the October meeting, the council voted to establish a foundation to accept contributions to supplement the funds available for the new building. The details of the foundation are

yet to be determined, but it will likely be organized as a 501(c)(3) entity with an independent board of trustees. The council, of course, is mindful that as a regulatory agency, it must be careful to avoid conflicts of interest. I anticipate that in the coming months, procedures to prevent conflicts will be carefully considered.

Q: The council has proposed that all newly admitted lawyers be required to take a special 12-hour CLE course on professionalism, professional responsibility, law office management, and perhaps other fundamental subjects. Why? Do you support the proposal?

I strongly support this proposal. With the increase in the number of newly licensed lawyers entering the profession at the same time that law firms are slowing their pace of hiring and even laying off lawyers, we have too many young attorneys who have no jobs, no mentoring, large debt, and who simply hang out a shingle. Law school has not taught them how to operate a law office, how to maintain a trust account, or how to act in a courtroom. Having the benefit of mentoring from great lawyers during my younger days as an attorney, I find it hard to imagine entering the profession without the benefit of that guidance. Hopefully this 12-hour course will bridge some of that gap.

Q: You are currently chairing a committee that is trying to decide whether it makes sense for the State Bar to be soliciting demographic information from its members regarding such characteristics as race, gender, and ethnicity. What type of information is the committee considering?

Currently we have no idea about the demographics of lawyers practicing in North Carolina. A number of other mandatory state bars in the country collect demographic data from their membership, and we currently have a committee looking at their experiences. Specifically, the committee is asking other state bars about how they collect the data, the cost associated with the collection, whether their collection is voluntary or mandatory, how the data is used, and whether the data has

proven to be helpful.

In a 2004 report published by the ABA, the Commission on Racial and Ethnic Diversity in the Profession stated that this type of data "plays a critical role in promoting the progress of minorities in the profession." The North Carolina Bar Association Diversity Task Force came to a similar conclusion. In the absence of this data, it is extremely difficult to measure progress in diversity or to evaluate where a program's focus is best placed.

Following our July council meeting, I received a letter from Mark Merritt, chair of the Lawyers Assistance Program. He wrote that the LAP Board had concluded that the collection of demographic data would be very beneficial to the LAP program: "The Lawyers Assistance Program believes that such data could be useful in helping us learn whether substance or mental and emotional illness affects certain groups within the Bar more than others. Such information would be helpful to target our treatment and education efforts." We have also received positive support from the North Carolina Bar Association, the Minorities in the Professions Committee, and The North Carolina Association of Women Attorneys, among other groups.

The State Bar committee is evaluating the feedback from all of these groups as well as the information obtained from other states. It expects to have a report at the January 2010 State Bar meeting.

Q: What do you enjoy doing when you're not practicing law or working for the State Bar?

Traveling, reading, watching Carolina basketball, "vegging" at the beach, and, most of all, spending time with my family.

Q: How would you like for your administration to be remembered when the history of the State Bar is finally written?

I'll let you know at the end of the year. ■

Bonnie Weyher is one of the founding partners of Yates, McLamb & Weyher, LLP, in Raleigh.

IOLTA Faces Difficult Economic Times

Income

In 2008, NC IOLTA became the 39th jurisdiction to implement a mandatory IOLTA program in order to increase funding available to meet the bar's obligation to ensure equal access to justice. Income for 2008 was the highest in NC IOLTA history, surpassing \$5 million for the first time. We registered over 3,000 new IOLTA accounts and saw approximately 25% of our income coming from those accounts. We are very fortunate that moving to a mandatory program in 2008 resulted in a 16% increase in income. Most IOLTA programs around the country reported significant income decreases in 2008. The income decreases resulted from the economic downturn, which has seen unprecedented low interest rates being paid on lower principal balances in IOLTA accounts. Absent the move to a mandatory program, NC IOLTA estimates there would have been a 12% decrease in income for 2008.

The deadline for compliance with the mandatory program was June 30, 2008. Despite a record year fueled by the new program, by December 2008 we experienced a 20% decline in income for that month. This trend continued in 2009, and we have had income declines of over 50% for every month since.

Grants

Considering projected declines in income at its December 2008 grant-making board meeting, the NC IOLTA trustees decided to keep total grants flat for 2009 at \$4.1 million and move \$750,000 of income from 2008 into reserve so that those funds would be available to fund grants for 2010 and subsequent years. Our reserves are now approximately \$2.67 million.

At the September 2009 board meeting, the trustees reviewed current income information as they planned for 2010 grants. This included an *estimated decrease of \$1.9 million* in funds, leaving only \$2.2 million available for 2010 grants. Though these preliminary figures are estimated using projections for five months in 2009, it is clear that there will be a severe

reduction in funds available for 2010 grants. The trustees also determined that reserves should not be depleted in making 2010 grants due to the uncertainty of the economic situation, which is expected to continue to affect income negatively at least into 2010. In addition, the trustees undertook the following:

- advised potential new grantees of the probability of NC IOLTA grants to new organizations or projects for 2010 is virtually nil;

- advised a number of grantees receiving administration of justice grants that they will receive no funding in 2010; and

- advised all remaining current grantees of our financial limitations and the prospect of probable decreases in 2010 grants and asked that each grantee address in its application the impact of the economic downturn on it, and its plan for dealing with decreased IOLTA funding.

Applications for 2010 IOLTA grants were due on October 1 and will be considered at the board's grant-making meeting in December. Twenty-four applications requesting \$4.2 million were received compared to \$2.2 million in estimated funds available (without use of reserves) and also compared to 43 grant applications requesting over \$5.7 million in 2009.

NC IOLTA appreciates that the NC State Bar Council adopted a revision to its rules to add \$0.50 per CLE credit hour to support the work of the Equal Access to Justice Commission. NC IOLTA granted funding to the commission over the last three years as it was becoming established. This dedicated funding through the State Bar will ensure the continuation of the commission's activities to address statewide access to justice issues while freeing IOLTA funds to support more direct legal aid services to the indigent.

State Funds

During the 2008 calendar year, in addition to its own funds, NC IOLTA administered over \$6.4 million in state funding for legal aid on behalf of the NC State Bar. Through the third quarter of 2009, NC IOLTA has administered \$4.8 million in state funding. At the

request of NC IOLTA and the NC State Bar, the Center for Death Penalty Litigation funds will be administered through IDS as of the 2009-11 biennium.

The legal aid programs worked hard in an effort to sustain state funding for legal aid work, which is even more necessary in the economic downturn. In addition, the Equal Access to Justice Commission, Equal Justice Alliance and the NCBA pressed for increased state funding to meet the legal needs of the poor. Unfortunately, appropriated funds for legal aid suffered a 25% decrease for the 2009-2011 biennium because of the economy. Of the foreclosure funds (\$200,000) that were added last year, \$100,000 for the Land Loss Protection Center was cut completely, and the funds for the Financial Protection Law Center were cut by 25%. The filing fee funds for legal aid's general support and domestic violence work were not affected by cuts. Supporters will be working to restore and increase legal aid funding.

FDIC Coverage of IOLTA Accounts

Following an intensive comment period regarding the rules of the FDIC Temporary Liquidity Guarantee Program during fall 2008, it was decided that all funds in an IOLTA account, regardless of size, are insured in full by the FDIC and backed by the full faith and credit of the United States Government (unless the bank opts out of the program with posted notices). This Transaction Account Guarantee Program (TAG) coverage has been extended through June 30, 2010. IOLTA accounts held in institutions that opt out of the TAG program are insured up to \$250,000 per owner (i.e. client). Information regarding FDIC coverage of trust accounts is posted on the State Bar website.

NC IOLTA Trustees and Leadership

At their long range planning/orientation board meeting in September, the board welcomed three new trustees appointed by the State Bar Council to begin a three-year term

CONTINUED ON PAGE 68

The Family Disease of Alcoholism

BY A LAP VOLUNTEER

On my first date with my husband, he warned me that he had a drinking problem. Assuming that this first date might be the only date anyway, I responded, "Sounds like a personal problem. Let's keep it that way." Those words should have served as a warning to me, but they did not. The large quantities of beer that he drank with apparent little affect also should have been a warning. It wasn't. However, when we spoke of marriage, I broached the subject of his drinking. I simply told him he would need to stop drinking if we were going to get married. His problem had become "our problem" and I had the quick solution—he just needed to stop. He quickly agreed and stated that he would go through treatment.

Looking back it's hard to believe how naïve we were about his drinking. We both believed that he would submit to whatever "treatment" was recommended, and he would be cured. Problem solved. It was not that simple at all, as we were to soon learn.

My husband entered treatment with great enthusiasm. After treatment, he got a temporary Alcoholics Anonymous (AA) sponsor right away and started going to "90 meetings in 90 days" as his sponsor recommended. It was not long before this focus on him and his recovery bothered me greatly. "Why can't you just go once or twice a week?" I complained. When he wanted me to join some of the people from his home group of AA for coffee, I was shocked. "I'm not going anywhere with those people!" was my response. To this day, I greatly regret my lack of understanding about addiction and how that lack of understanding undermined my husband's recovery at that time. My husband's sponsor suggested to my husband that we separate so he could focus on his recovery without my interference. My husband refused to follow his advice and he relapsed shortly thereafter. What we did not realize at the time was that alcoholism is a family disease, and I had been affected by the disease as well.

That first relapse was followed by a series of attempts at treatment via various facilities

and programs for my husband. At one point, he was attending court-ordered treatment after receiving a driving while impaired conviction. He would drink between his treatment meetings and I decided that I would have to report his indiscretions since I was an officer of the Court. So, I got in my car and drove to the treatment office, walked in, and informed his therapist that my husband had been drinking. This kind man nodded his head thoughtfully and then asked me what was I doing for myself, and told me a little about Al-Anon. I quickly told him I was "fine" and left. I was seething with outrage on my drive home. How dare he presume that there was anything wrong with me! I wasn't the alcoholic! I wasn't the one with the problem! I was a lawyer, for God's sake!

My husband continued to drink, and I marched back into his therapist's office to report his transgressions again. Again, the treatment counselor asked me if I was taking care of myself. Again, I told him I was "fine" and that I was just there to report on my husband. Period. He could do what he liked with the information I provided, I just wanted to make sure I did my duty. He attempted to tell me about Al-Anon again, but I wasn't particularly receptive, though I was polite. He ended by giving me a lady's name and number to call if I wanted to know more about getting healthy myself. I thought he was quite presumptuous to assume that I was anything but healthy and in charge of my world. However, I put the bit of paper he had given me in my pocketbook "just in case."

My husband's disease progressed, and my pain, frustration, and isolation increased. I found myself saying and doing things that were completely out of character, all in response to the alcoholic's drinking. I would scream and cry, threaten and plead. Nothing worked. I would drop my husband off at AA meetings at times and I would know that an Al-Anon meeting was being held at the same time, but I would rather sit in the car for an hour rather than try Al-Anon. I was convinced I was "fine" despite all the emotional



evidence to the contrary. Finally, my pain compelled me through the doors of Al-Anon.

I must say that one of the greatest hurdles I had to overcome in going to my first Al-Anon meeting was walking through the front door. It seems that alcoholics are invariably smokers and there would always be a large group of people standing outside the church doors in which the meetings took place. It terrified me to walk past that group. But I did.

At my first meeting, I was taken out of the regular Al-Anon group to have a "newcomer's meeting." This is where one or two Al-Anon members explain the program to persons who are attending for the first time. The two women who spoke with me explained that the program of Al-Anon was for the family and friends of alcoholics and was based upon the 12 steps of Alcoholics Anonymous. One lady took the lead in explaining things to me. She was soft-spoken and kind and I immediately liked her. When she told me her name, I pulled out the slip of paper given to me by my husband's counselor. She was the very same person to whom he had referred me. Despite my never using the number, and my long refusal to go to Al-Anon, I ended up speaking with the very same person.

My first months of Al-Anon were difficult. The focus in the meetings was on us and not the alcoholic. I had a great deal of difficulty with the principles of the program, because what I really wanted was solutions for my husband, not for myself. So, I would ask questions about what I should do when my alcoholic did this, or that. By gosh, I wanted answers, needed answers! I was kindly diverted to looking at myself and focusing

on my recovery. Slowly, very slowly, I began to accept that maybe I wasn't perfect in every way and might have my own issues that needed to be addressed. I slowly began to look at my own life.

My life started with my father's death—or at least it seemed that way. I was five years old and that is the day when my first really clear memories begin. The presence of my mother—who had 4 children under the age of 8 and was pregnant—also suddenly changed. Well-meaning relatives kept us away from her for the most part in the days following my father's death. And the nurse who came during the day to assist my mother after my youngest sister was born locked us out of the house so as not to disturb her. Afterwards, she had to go to work...so we lost her in other ways as well.

My father's wake instilled a great fear in me. We knelt beside my father's open casket in a row with my mother. My father was in his police officer's uniform. I thought he was sleeping and tried to tell my mother he was sleeping. I wanted to reach out and shake him awake, but a fear paralyzed me. It would not be the last time that fear would immobilize me.

Not long after my father died, my uncle persuaded my mother to buy me a beagle puppy. "Princess" was sweet and loving and I adored her. But she came down with distemper and had to be euthanized. Looking back, I realize the "loses" I suffered helped develop traits in me that would influence how I interacted with the world. As soon as I was old enough to cross the street alone (and in those days this occurred at a much younger age than the present generation), I began bringing home stray dogs and cats. I sometimes managed to keep them for a few days, sometimes a couple of weeks, before the ASPCA would be called to take them away. I was always crushed at the loss, but my caretaking tendencies continued to blossom. I kept frogs, tadpoles, injured birds, abandoned kittens, and devoted myself to caring for whichever needy, and sometimes simply unlucky, animal crossed my path. As I got older, I nursed countless animals to health.

As I entered puberty, I started to have interactions with men. Because I didn't have a father and because we had moved 700 miles away from all our relatives, male and female, I knew little of men. I knew less about sex. A 16-year-old sexually assaulted me when I was 12. I didn't tell my mother. Like many chil-

dren, I assumed it was my fault. The next several years I experienced a frightening number of incidents where I was fighting off the advances of men. Instinctively, I knew there was something about me that made some men think this behavior was okay, I just didn't know what the attractant was. (Believe me, it wasn't my ravishing beauty.) Apparently, the little abandoned girl in me had "victim" written on my forehead for all opportunists to see.

At 16, I met a man who told me he was 23, which was too old. He was actually 28. He was wild and unpredictable—and desperately needed me. He treated me horribly and I was devoted to him. My high school education took a side seat while I made myself available to him and chased after him. I ended up at night school and the principal, once an editor with a local newspaper, took an interest in me. He gave me select writing assignments, which he shared with another person in the newspaper industry. They encouraged me to go into writing and offered me a chance to write a book review. I didn't have time for such things—I was too busy worrying after this man. This relationship resulted in my being an unwed mother at 19 years of age. This first relationship, and those that were to follow, were all unhealthy emotionally.

My "traits" affected my work, as well. I am a strong person in many ways and, after having my daughter, knew I needed better employment than the restaurant work I had started in as a teenager. I got a factory job. I lived alone in the country with my infant daughter. I didn't bother anyone, but I was sexually harassed each time I walked onto the job. I was the lone female in an all male plant. (They had to build a bathroom for me before I could start my position.) I only complained once about the harassment I received daily and that was when a man actually walked up to me and grabbed my breasts as I was going about my work duties.

As with any employment I have ever had, I worked hard, excelled, and tolerated abuse and unfairness without complaint. My daughter's father had never provided any financial assistance. I finally decided I would go to college where I could earn more money, thinking that perhaps then someone couldn't just come along and devastate my life. I sold my house, quit my job, and entered college, my two-year-old daughter in tow.

I entered college with the idea of becoming a veterinarian. However, I didn't take the nec-

essary math in high school. While I could do chemistry, I couldn't do basic algebra. Between going to school, working, and being "mommy," there simply wasn't time for tutoring as well. By the beginning of my junior year, I was a physical wreck. I was nauseous all the time and plagued with headaches. I had stabbing pains in my side and abdomen. The university doctor told me that while he could run a number of tests to try to determine the cause of my maladies, he felt that all of my symptoms were a result of stress. Although I wouldn't consciously admit it, my body was telling me that work, school, science labs, being mommy, etc. was just too much. So, I switched majors from Zoology to English. My symptoms began to subside almost immediately. When I graduated with my English degree, I had only managed to accumulate debt through school loans and had no idea what I wanted to do. Someone suggested law school. I had never wanted to be a lawyer, never even considered it. I always took zeros in school rather than speak in front of the class. I decided to go to law school.

Law school came easy. My reading and writing skills were great assets for law school. Trying to stay afloat financially was my biggest challenge. During this time, I became involved in another unhealthy relationship, which resulted in my allowing myself to be drained even more financially. I was pregnant when studying for the bar exam, and had to have my name removed from consideration for employment recruitment—just another incident of me making my life exceedingly more difficult by trying to accommodate the needs and demands of another. I had to wait until my son was born and old enough to attend daycare before I could begin my legal career.

My "traits" also affected my interactions as a lawyer. (You should probably consider it a problem when you care more about your client's case than he or she does.) As an assistant public defender, I worked myself to exhaustion. Invariably, I worked every weekend. It was good to have defendants say how much they appreciated how hard I tried for them, but I did it at the expense of my own health and well-being. (I recall one of my coworkers scolding me that I cared "too damn much!") I later learned he was a recovering alcoholic.) There was no balance. If I stopped for a moment, I would fall asleep. I would have to fight falling asleep at the wheel driving to and from work. My memory suf-

ferred. Rather than realizing that my inability to determine healthy boundaries was killing me, I decided I needed a different job. The change of job changed nothing, except that I worked even harder, longer, and was even more exhausted.

During the time that I lived in the country, I had a run-in with a very large snake. One afternoon, my dogs started barking. I yelled at them to be quiet, nothing happened. I yelled some more. No results. Exasperated, I jumped from the bed and ran out the side door. I was intent on scolding my dogs. Instead of running the other way, they circled around me and continued to bark. I turned just in time to see a large black snake retreating into the house. I ran up the steps to see the snake weaving its way across the kitchen floor. I had to do something quickly! An inspiration hit me as I recalled Jim from *Wild Kingdom* saying you could grab a snake behind the head and it couldn't harm you. I ran up to the snake and snatched him up as directed. He proceeded to wind around my arm and then around my chest. I could not unwrap him from my chest with one hand, and was too frightened to let go of his head. Not knowing what else to do, I decided to look for help. I climbed into my Toyota Corolla and drove to my neighbor's home. I got out and knocked on her door. She finally came, wiping her hands on a dish towel, until she stopped dead in her tracks. I asked her to please help me remove the snake. In classic country style, she responded, "Well, what'd you pick it up fer?" I tried to explain but nothing really made sense at that point. She refused to touch it, but said she would call another neighbor who might help. I heard her conversation through the screen door: "David, can you kill a snake? No, that's all right, we'll bring it to you." I thought to myself, "You gotta be kidding." But no, my neighbor insisted on driving me there. We drove to David's where his family stood in the yard, waiting. He naturally walked to the bed of the truck and looked puzzled...until I stepped out of the truck. It dawned on me, much later, when I was in recovery, that alcoholism was much like that snake. I unknowingly brought it into my life and it wrapped itself around me. I couldn't relieve myself of its effects without help.

In learning to work the program of Al-Anon through attending meetings, getting a sponsor, and working the steps, I discovered

that, in fact, I had had a great deal of difficulty in my life that began long before I met the alcoholic. I was able to look back at my life and see that I had made, over and over again, decisions that could not help but cause me pain. I realized that most of my significant relationships had been dysfunctional and I had continually involved myself with persons who needed to be rescued. So many times in my life I had characterized myself as a victim, yet I now realized I bore a great deal of responsibility for my own victimization. Working the steps and learning about myself was hard, but one of the best gifts I have ever given myself.

You first start noticing the changes wrought by working the 12 steps in little ways that gradually become incredibly significant. Initially, it was things like taking time to attend an extra meeting or standing firm on an issue. There were so many days when I was at work that I couldn't concentrate, worrying about the alcoholic's drinking. It was amazing when I was able to turn over the alcoholic and his choices to God and focus on the task before me. There were so many nights I spent awake, crying hysterically, because the alcoholic was out drinking and had not returned home. It is frightening to think of the times I went looking for him at seedy bars in the middle of the night. Often I would get a call from him, a police officer, or a bartender, asking me to come pick him up at 2:00 am. When I was able, through the use of the Al-Anon program and working the 12 steps, to sleep on such a night, it was unbelievable! When I was able to say "No, I will not pick you up," "No, I will not pay his bar tab," "No, I will not pay his taxi," and even, "I'm sorry sir, but you will have to go ahead and take him to jail," it seemed like an absolute miracle. The anger that I generally struggled with during such episodes also dissipated. Eventually, I was able to say to the alcoholic, when he called for me to pick him up in the middle of the night, not only that I would not pick him up, but also that I hoped he would be okay and that I loved him before I hung up. I learned to detach with love and I learned to accept not only that I was powerless over him and his choices, but I was not responsible either. An incredible burden, which I had picked up on my own and hoisted on my own shoulders unwittingly, was lifted from me.

The program of Al-Anon, coupled with the 12 steps of AA, changed my life. I saw

how the young me had tried desperately to get the love I needed in all the wrong ways. When I was new to Al-Anon, I would hear members who had been in the program for some time state that he or she was grateful for the alcoholic in his or her life. At the time, I thought they must be delusional! Now, I find myself exceedingly grateful for the alcoholic in my life. If it had not been for the alcoholic, I would have never been open to this simple program of recovery. It was through my pain that I was able to be honest with myself that I needed help, that my life was out of control, that I was out of control, and that I was anything but "fine." I had not been "fine" for a long time. But I gradually got better and better.

I have shared with other lawyers I know how grateful I am to have married an alcoholic. They always look at me like I'm crazy and sometimes tell me so. It's hard to put into words how much Al-Anon has done for me and how very grateful I am for all I have received, and continue to receive, from the program. The soft-spoken and kind lady who welcomed me to Al-Anon has been my sponsor since my first meeting. She has supported me through some very trying times and has always been a voice of calm, a voice of wisdom, a voice of serenity. I am convinced that sponsors are gifts we give to ourselves, and I gave myself a priceless gift when I asked her to be my sponsor. I do not believe, however, for a minute that our connecting was simply coincidence. God was doing for me what I couldn't do for myself. I have noticed a lot of "God" things since being in a program of recovery.

The friends I have met in recovery are also a wondrous blessing in my life. Within the confines of AA and Al-Anon, I can be myself, expose myself, and know I will always be accepted. I regularly attend open AA speaker meetings, which have been a great venue for learning to understand the alcoholic. And "those people" that I could not envision having coffee with so many years ago I now meet weekly for dinner before Friday night meetings and I would jump at the chance to see them even more frequently.

My program of recovery has also helped me immensely in my job. Working in the court system, one can't help but observe the devastation wrought on families by the disease of addiction. Understanding that disease, and understanding the 12 step principles, provides

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Profiles in Specialization—Joseph G. Maddrey

AN INTERVIEW BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Joseph G. Maddrey, a board-certified specialist from Eden. Joe graduated from Wake Forest University with a degree in history and political science. He received his JD from Wake Forest Law School as well. Joe achieved his board certification in residential real property law in 1991. The following are some of his comments about the specialization program and the impact it has had on his career, as well as his expectations for the future.

Q: Why did you pursue certification?

In the early 1990s, real property law was my primary focus and I wanted the public to know that. I wanted to be highly prepared to represent my clients and I made a concerted effort to get better in that one area.

Q: How did you prepare for the examination?

I did so very easily, in fact. I read *Webster's Real Estate Law*, a two-volume treatise, which is the bible of real property law. I also read real estate cases that had been decided in the appellate courts for the two previous years. I felt lucky when one of those cases showed up in an exam question!

Q: Was the certification process (exam, references, application) valuable to you in any way?

The exam was the most valuable. As most exams do, it made me aware of the areas of real property law that I still had not learned to the level I should have or thought that I had. After the exam I could tell that I still had a few areas to work on.

Q: Has certification been helpful to your practice?

I find the additional requirements for continuing legal education to be most helpful in keeping me current with real property issues. I look for good courses and generally learn a lot.

Q: Who are your best referral sources?

I get quite a few referrals from realtors and mortgage brokers. Some realtors have a policy, if asked, of recommending two to

three lawyers to do a closing, but often they will point out that only one has been designated a specialist by the NC State Bar.

Q: Are there any hot topics in your specialty area right now?

Needless to say, real property law is not generally known as a "hot topic" area of the law, but upcoming RESPA changes and recent legislative changes to the foreclosure and partition statutes are areas that real property attorneys are getting excited or concerned about.

Q: Is certification important in your practice area?

One important aspect of real property law is that closings, title certification, deeds, deeds of trust, easement, etc. never go away. They are a permanent record for the world to see, recorded in the register of deeds or clerk's office. For example, any act performed four years ago regarding real property can hold the same legal significance today. Since the educational requirements of certification require a constant review of the basic laws and procedures of real property, it helps to minimize mistakes. Just when you think you know a subject, that is when you can make a mistake. Constant review of the law in the area of your practice is the best way to serve your client and yourself and certification helps you achieve this. Certification helps to give you a comfort level of confidence about the laws of your specialty.

Q: Is certification important in your region?



Joseph Maddrey

Rockingham County is a non-urban county and, as such, we have a wide range of real property issues, such as adverse possession, easements, partition of farm lands, cartway proceedings to cut timber, lappage, etc. I have to be knowledgeable of the law on all these subjects and find that my annual CLE courses eventually cover all these subjects. This assists me as I advise clients and handle their legal proceedings.

Q: How does specialization benefit the public and the profession?

The public benefits from specialization because when a client uses the legal services of a specialist, he or she gets the benefit of an attorney who has been proven knowledgeable by the NC State Bar in that area of the law. The profession benefits from specialization because, like the medical profession, being designated as a specialist

raises the standard of competence and ability in the practice of law.

Q: Have you had a recent case or situation where your specialization came in handy?

I serve as a North Carolina State Bar Councilor from the 17A Judicial District and serve on the Ethics Committee as well. Over the last three to four years the Ethics Committee has had to determine several real property ethical issues. I was appointed to the subcommittees that studied these issues to make recommendations to the full Ethics Committee. I feel that my specialty certification in real property law enabled me to have an in-depth understanding of the issues and hopefully assist the Ethics Committee in arriving at the proper decisions.

Q: What would you say to encourage other lawyers to pursue certification?

The time and effort needed to pursue certification is worth it. I realize that sitting for the exam is the reason most attorneys choose not to pursue board certification, but I would suggest that the time needed to prepare for the exam is the same as preparing for an important case or file. You set aside a block of time with everything in front of you and review and analyze it until you feel you are prepared. It does not take as long as you think to get prepared. The first and most important thing you have to do is make a determination in your mind that you want the specialty certification. The rest will fall into place. It gives you a sense of pride and a feeling of confidence

In Memoriam

John H. Anderson
Winston-Salem

Grainger R. Barrett
Fayetteville

Grace C. Boddie
Cary

Joseph J. Estwanik IV
Charlotte

Robert W. Fisher
Asheville

William T. Grist
Charlotte

Edwin J. Hamlin
Raleigh

David H. Henderson
Charlotte

Robert J. Hensley Jr.
Raleigh

O. H. Hester Jr.
Hickory

Michael W. Hubbard
Raleigh

Alex R. Josephs
Charlotte

William L. Osteen Sr.
Greensboro

Charles B. Park III
Beaufort

Janet A. Powell
Atlanta

Gary W. Ragland
Clayton

William J. Rendleman
Salisbury

W. Allen Schmitt
Jamestown

Wright Tisdale Jr.
Knoxville, TN

Richard Tyndall
Mooreville

Perry N. Walker
Greensboro

that you are good in your area of the law and that both your profession and the public recognize it. ■

For more information on the State Bar's specialization program, please visit us on the web at www.ncclawspecialists.gov.

LAP (cont.)

me with a unique knowledge and empathy I would not have otherwise had. Over time, I have become more convinced that those of us in recovery should be shouting from the rooftops that recovery works! While I would never hold myself out to be a spokesperson for Al-Anon, I can be an advocate for recovery and the principles embodied in the 12 steps.

I am most grateful for my personal, and continuing, recovery. I now know that I can be happy and at peace, whether the alcoholic is drinking or not. I have my own program of recovery that keeps me grounded in faith and hope and provides me with an abiding serenity. I found my spiritual self in Al-Anon and a

closer relationship with my higher power, who I choose to call God. And for that I will be forever grateful. ■

This is a story of a PALS volunteer affected by the disease of alcoholism. It is offered anonymously in the spirit of the recovery precepts that place principles above personalities. This story reflects why alcoholism is called a family disease. The normal need for human love and emotion is subtly affected by the emotional unavailability of someone suffering from addiction. What might have started as the appropriate need of a child who loses a father, is exaggerated by another's alcoholism into a whole series of symptoms and misguided coping mechanisms, usually with the person involved totally unaware. If you would

like to speak with the author, please send Don Carroll an e-mail (nclap@bellsouth.net).

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you are a North Carolina lawyer, judge, or law student and would like more information, go to www.nclap.org or call toll-free: Don Carroll (for Charlotte and areas West) at 1-800-720-7257, Towanda Garner (in the Piedmont area) at 1-877-570-0991, or Ed Ward (for Raleigh and down East) at 1-877-627-3743. Don is the author of "A Lawyer's Guide to Healing" published by Hazelden.

Council Responds to Three Real Property Inquiries

Council Actions

At a meeting on October 23, 2009, the State Bar Council adopted the opinions summarized below upon the recommendation of the Ethics Committee:

2008 Formal Ethics Opinion 14

Attribution When Using the Written Work of Another

Opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer.

2009 Formal Ethics Opinion 9

Computer-Based Conflict Checking Systems

Opinion describes reasonable procedures for a computer-based conflicts checking system.

2009 Formal Ethics Opinion 10

Supervising a Non-lawyer Appearing in an Unemployment Hearing

Opinion rules that a lawyer must provide appropriate supervision to a non-lawyer appearing pursuant to N.C. Gen. Stat. §96-17(b) on behalf of a claimant or an employer in an unemployment hearing.

Ethics Committee Actions

At its meeting on October 22, 2009, the Ethics Committee voted to withdraw and send the following proposed opinions to subcommittees for further study: Proposed 2009 FEO 1, *Review and Use of Metadata*; Proposed 2009 FEO 7, *Interviewing a Child Witness*; and Proposed 2009 FEO 8, *Service as Commissioner after Representing Party to Partition Proceeding*. Two proposed opinions, previously published in the *Journal*, were revised and appear below. Seven new proposed opinions are also published for comment. The comments of readers are welcomed.

Proposed 2008 Formal Ethics Opinion 11

Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee October 22, 2009

Proposed opinion rules that a lawyer may

serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

Inquiry #1:

Attorney A is employed by Law Firm. The lawyers of the firm routinely represent various bank clients including Bank Z. Bank Z is one of the firm's largest clients and all of the lawyers in the firm perform some work for the bank.

Attorney A has been asked to serve as the substitute trustee for the foreclosure of a deed of trust securing a loan (the Loan) made by Bank Z to the grantor (the Borrower) of the deed of trust. Bank Z is the named beneficiary of the deed of trust. The lawyers at the firm did not represent Bank Z on the negotiation or securitization of the Loan. The lawyers have not previously represented the Borrower.

Attorney A and the other lawyers in Law Firm want to continue to represent Bank Z on unrelated legal matters throughout the course of the foreclosure proceeding. Bank Z does not object. Borrower has not been notified that Attorney A and the other lawyers of the firm represent Bank Z on other unrelated matters.

May Attorney A continue to represent Bank Z on matters unrelated to the Loan and serve as substitute trustee for the foreclosure?

Opinion #1:

Attorney A may serve as trustee and continue to represent the bank on other matters because it is unlikely that his impartiality as trustee will be impaired by his duty of loyalty to and advocacy for the bank on other unrelated matters. Even when the proceeding is contested, Attorney A may serve as trustee and continue to represent the bank on other matters.

There are a number of ethics opinions that hold that a lawyer serving as trustee in a contested foreclosure proceeding may not

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics," 27 N.C.A.C. ID, Sect. .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by December 30, 2009.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

act as the advocate for the beneficiary or the grantor in an adversarial proceeding arising from or connected with the deed of trust because the trustee is a fiduciary and, when exercising his discretion in the foreclosure, must play an impartial role relative to both parties. RPC 3, RPC 64, RPC 82, RPC 90, 04 Formal Ethics Opinion 3. See also N.C. Gen. Stat. §45-21.16(c)(7)b (notice to the debtor must contain a statement that a trustee is "a neutral party and,

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding"). None of the ethics opinions, however, consider whether a lawyer is disqualified from serving as trustee if he continues to represent the lender on unrelated legal matters.

RPC 3, which rules that a lawyer may serve as a foreclosure trustee after representing the beneficiary of the deed of trust in the negotiation of the loan, explains the basis for prohibiting the lawyer from acting as an advocate in a contested foreclosure proceeding in the following passage:

[T]he Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding....Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns [for the] confidences of the client under Rule 4 [now Rule 1.6] and its predecessors or because of conflicts of interest under Rule 5.1 [now Rule 1.7] or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding. Since neither of those circumstances exist, and the rules do not appear to be directly relevant by their terms or with regard to their purposes, Attorney A is not ethically prohibited from continuing to serve as Trustee in a contested foreclosure matter, despite his prior representation of [beneficiary of the deed of trust], where he does not currently represent [beneficiary] in the foreclosure or related proceedings.

To clarify these earlier opinions, a foreclosure proceeding is contested when the

grantor, or anyone else with standing, seeks to enjoin the proceeding or contests any of the following issues at the foreclosure hearing: jurisdiction, service of process debt, default, notice, power of sale, and, in the case of residential mortgages, certification regarding subprime loans.¹ A borrower's motion to continue the proceeding or request to postpone the sale does not render the foreclosure contested. As with the trustee's own motion for a continuance or decision to postpone, these are procedural matters to which the trustee may respond within his or her discretion without impairing his or her ability to foreclose on the property consistent with the statutory requirements and the deed of trust.

If Attorney A represents Bank Z in other matters and the foreclosure is contested, Attorney A can maintain his impartiality as trustee if the bank represents itself or hires a lawyer to represent it in the foreclosure proceeding. Nevertheless, if Attorney A determines that he cannot protect and advance the interests of the bank in the unrelated matters while remaining impartial in a contested foreclosure proceeding where a substantial interest of the bank is at stake, Attorney A would have a conflict of interest requiring him to decide whether to continue to represent the bank on the unrelated matters and relinquish the trustee role to someone who will not be similarly compromised or to fulfill the role of trustee by withdrawing from the representation of the bank in all other matters. *See also* Rule 1.7(a)(1)(concurrent conflict of interest exists if representation of one or more clients may be materially limited by the lawyer's responsibilities to a third person).

Inquiry #2:

Perceiving that he has a personal conflict of interest, Attorney A withdraws from the representation of Bank Z on all unrelated matters in order to continue to serve as trustee. Are the other lawyers in Law Firm required to withdraw from the representation of Bank Z on matters unrelated to the Loan if Attorney A serves as the substitute trustee for the contested foreclosure?

Opinion #2:

No, the other lawyers in the firm may continue to represent Bank Z on unrelated matters.

Rule 1.10(a) provides that a disqualifi-

cation based upon a personal interest of a lawyer that does not present a significant risk of materially limiting the representation of a client by the remaining lawyers in a firm is not imputed to the remaining lawyers in the firm. Comment [3] to Rule 1.10 specifies that "[t]he rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." Serving in the role of trustee does not raise questions of client loyalty or protection of confidential information because the lawyer/trustee does not represent either party in the foreclosure. Therefore, Attorney A's disqualification from the representation of Bank Z to maintain his impartiality is not imputed to the other lawyers in the firm who are representing the bank on matters unrelated to the Loan and the foreclosure.

Inquiry #3:

Attorney B, another lawyer in Law Firm, intends to act as the lawyer for Bank Z in connection with the Loan including representation in the foreclosure proceeding. May Attorney B represent Bank Z on all matters related to the Loan, including the foreclosure, if another lawyer in his firm is serving as the trustee?

Opinion #3:

No, if the foreclosure is contested, Attorney B may not represent Bank Z at the foreclosure proceeding or on any matter related to the Loan. Attorney A's impartiality may be impaired if another lawyer from his firm appears in the foreclosure or related matters on behalf of the bank. To preserve the integrity of the process and the impartiality of the trustee, Attorney A's disqualification from serving as an advocate for one of the parties to a contested foreclosure in any matter related to the Loan is imputed to the other lawyers in the firm. *See* Rule 1.10(a).

Inquiry #4:

May another lawyer in the firm represent Attorney A in his capacity as trustee for the foreclosure?

Opinion #4:

Yes, and the lawyer may continue to do unrelated legal work for the bank while representing Attorney A as trustee. *See* Opinion

#1 above. However, if Attorney A determines that he has a conflict of interest in serving as the trustee while continuing to represent the bank on unrelated matters and withdraws from the representation of the bank on unrelated matters to continue to serve as trustee, a lawyer representing Attorney A as trustee would be similarly disqualified. *See* Rule 1.10(a).

Inquiry #5:

Law Firm has set up a separate entity, Firmco, to serve as trustee on deeds of trust. Law Firm or its lawyers have a controlling ownership interest in Firmco. Firmco is substituted as trustee on the deed of trust securing the Loan made by Bank Z. May a lawyer in the firm represent Firmco in its capacity as trustee for the foreclosure? May the lawyer continue to do unrelated legal work for the bank?

Opinion #5:

Yes, the lawyer may represent Firmco as trustee and the lawyer representing Firmco may continue to do unrelated legal work for the bank. *See* Opinion #4. However, a lawyer for the firm may not simultaneously provide representation to Firmco and advocate for the lender in a contested foreclosure proceeding. *See* Opinion #1.

Inquiry #6:

Should the Borrower be informed that Attorney A and the other lawyers in Law Firm will continue to represent Bank Z on matters unrelated to the foreclosure?

Opinion #6:

Yes. The role of the trustee in a foreclosure proceeding is similar to the roles of arbitrator or mediator which are addressed in Rule 2.4. Rule 2.4(b) provides that when a lawyer serving as a third-party neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client. Similarly, explaining the role of the trustee and the role of the other lawyers in the firm (who continue to represent the bank) to a borrower in a foreclosure proceeding will help to avoid confusion and will allow the borrower to pursue his legal remedies to remove the trustee if he objects.

Inquiry #7:

If Borrower informally objects to Attorney A serving as the trustee because Attorney A and the other lawyers in the firm represent Bank Z on unrelated matters, is Attorney A required to withdraw from service as trustee?

Opinion #7:

No, Attorney A is not required to withdraw unless ordered to do so by a court.

Inquiry #8:

Do the responses to any of the preceding inquiries change if Bank Z is not one of the largest clients of Law Firm?

Opinion #8:

No.

Endnote

1. G.S. §45-105 allows the Commissioner of Banks (COB) to delay the time within which a lender can file a foreclosure proceeding on a subprime loan for a period of up to 30 days and to suspend a foreclosure on a subprime loan based upon its review of loan information that the lender must file with the Administrative Office of the Courts pursuant to G.S. §45-103. The clerk of court must find that the loan is not subprime or, if subprime, that the COB has not delayed the time for filing the foreclosure proceeding or suspended the foreclosure based its review of the loan information.

Proposed 2009 Formal Ethics Opinion 3 Nonlawyer Employee Contacting Clients of Former Employer October 22, 2009

Proposed opinion rules that a lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

Inquiry:

May a nonlawyer employee of a law firm, who recently changed law firms, write to clients of his/her former employer with whom the nonlawyer had established relationships to inform the clients that the nonlawyer is employed with a new law firm and that the new law firm handles the same type of legal matters?

Opinion:

The Rules of Professional Conduct govern the actions of lawyers, rather than nonlawyers. However, a lawyer having direct

supervisory authority over a nonlawyer employee has a duty to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Furthermore, the lawyer may be held responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. *See* Rule 5.3(c).

The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. *See* Rule 1.6, 1.9. Comment [1] to Rule 5.3 provides that a lawyer must give nonlawyer employees appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of a client. A client's identity, and the fact that the client had previously retained a lawyer for a particular purpose, is confidential information. Rule 1.6 and Rule 1.9 refer to the duty of confidentiality that a lawyer owes to his own current and former clients. However, the deference that the legal profession gives to a lawyer's duty of confidentiality would mandate that a lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

No opinion is expressed on the legal question of whether a communication with a client of the nonlawyer's former employer constitutes interference with a contract.

Proposed 2009 Formal Ethics Opinion 11 Representing Debtor in Bankruptcy When Lender is Current Client October 22, 2009

Proposed opinion rules that a lawyer may not undertake the representation of a debtor in a Chapter 13 bankruptcy if the lender is lawyer's current client.

Inquiry #1:

Lawyer regularly represents Lender in various matters. Lawyer is approached by Client to represent Client in an individual Chapter 13 bankruptcy. Lender has made a loan to Client. To secure the repayment of the loan, Lender holds a first priority deed of trust on Client's residence, a first priority deed of trust on Client's commercial building, and a first priority lien on

Client's vehicle. Lawyer currently represents Lender in other matters, but not with regard to the indebtedness of Client to Lender.

As the lawyer for Client in the Chapter 13 bankruptcy, Lawyer will be responsible for reviewing documentation to determine whether Lender and other secured creditors have valid and enforceable security interests in or liens on Client's property. May Lawyer undertake the representation of Client in the Chapter 13 bankruptcy if Lender and Client consent?

Opinion #1:

No. Because Lawyer currently represents Lender, Lawyer has a conflict of interest in representing Client in a bankruptcy action in which Lender is a creditor. *See* Rule 1.7(a). Comment [6] to Rule 1.7 provides that "absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." Generally, if a lawyer with a conflict reasonably believes that he will be able to provide competent and diligent representation to both clients, he may take on the representation so long as he obtains both clients' informed written consent. *See* Rule 1.7(b). However, certain conflicts are nonconsentable, "meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Rule 1.7, cmt. [14].

Consentability is determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to the representation given the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to each client. *See* Rule 1.7, cmt. [15].

In the instant scenario, the interests of the lender and the debtor are adverse. Lender would benefit if Lawyer determines that Lender's deeds of trust and liens are valid and enforceable. Conversely, debtor would benefit from an opposite finding. The representation of either client could be materially limited by the lawyer's responsibilities to the other client and, thus, the lawyer's independent professional judgment for both clients will be impaired.

Even after full disclosure and client consent, Lawyer cannot "reasonably believe" that representation of one or the other client will not be adversely affected.

Inquiry #2:

Lawyer regularly represents Lender in various matters. Lender has made a loan to Client. To secure the repayment of the loan, Lender holds a first priority deed of trust on Client's residence, a first priority deed of trust on Client's commercial building, and a first priority lien on Client's vehicle. Lawyer currently represents Lender in other matters, but not with regard to the indebtedness of Client to Lender.

Lawyer is approached by Client to represent Client in an individual Chapter 13 bankruptcy. The loan from Lender to Client has matured and Client wants to extend the maturity date of the loan. May Lawyer represent Client in negotiations with Lender?

Opinion #2:

No. Rule 1.7(a)(1) provides that a lawyer shall not represent a client if the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client. Rule 1.6(a) provides that a lawyer shall not reveal information acquired during the professional relationship with a client.

In the instant scenario, Lawyer's regular representation of Lender means that there is a high probability that Lawyer has knowledge of Lender's decision-making practices and its preferred approach to negotiations. This information would be useful to Client. However, Lawyer may not reveal this information to Client without violating the duties owed to Lender under Rule 1.6(a). Therefore, Lender may not represent Client in negotiations with Lender.

Inquiry #3:

May Lawyer represent Client as to the extension of the maturity date of the loan if Client and Lender reach an agreement for an extension without Lawyer's involvement? If so, may Lawyer file a motion seeking bankruptcy court approval of a refinancing agreement between Client and Lender in order to extend the maturity date of the loan, and then represent Client at the hearing on the motion?

Opinion #3:

No. Although Client and Lender have already reached an agreement as to the extension, Lawyer may have knowledge gained from the regular representation of Lender that would require Lawyer to advise Client against seeking court approval of the agreement. Because Lawyer may not use this information without violating the duties owed to Lender under Rule 1.6(a), Lender may not represent Client as to the extension.

Proposed 2009 Formal Ethics

Opinion 12

Preparation of Documents for Unrepresented Adverse Party October 22, 2009

Proposed opinion rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

Background:

Supply Company is owed money by Contractor. Contractor is not represented by counsel. Contractor agrees to enter into an affidavit and confession of judgment in favor of Supply Company. The affidavit and confession of judgment is prepared by Supply Company's lawyer. The affidavit and confession of judgment contains a provision that states that Contractor "waives with prejudice any right it may have to appeal, modify, stay, or vacate the judgment, and it expressly waives the 30-day deadline to appeal the entry of the judgment."

Supply Company's lawyer also prepares a document for Contractor to sign entitled "Waiver of Exemptions." The document provides that Contractor has consulted with counsel, has previously executed a confession of judgment in favor of Supply Company, has been advised by counsel of the right to designate property, and has freely, knowingly, and voluntarily waived any and all exemptions provided by Article 16 of Chapter 1C of the North Carolina General Statutes (Exempt Property) and any and all exemptions afforded by Article X (Homesteads and Exemptions) of the North Carolina Constitution.

Inquiry #1:

May the lawyer for Supply Company include language in the affidavit and confession of judgment waiving Contractor's right to appeal, stay, or vacate the judgment and waiving the 30-day deadline to appeal the entry of the judgment?

Opinion #1:

Yes. However, the language in the affidavit and confession of judgment must be clear enough to put Contractor on notice that it is waiving important rights and must be sufficient to make Contractor's waiver knowing, intelligent, and voluntary.

Rule 4.3(a) provides that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature.

Whether a lawyer may submit documents to an unrepresented person for signature depends upon whether the lawyer's actions are categorized as the rendition of legal advice or mere communication. The Ethics Committee has previously ruled that a lawyer may provide an unrepresented party with a confession of judgment for execution provided the lawyer does not undertake to advise the unrepresented party concerning the meaning or significance of the document or to state or imply that the lawyer is disinterested. *See* RPC 165. However, it is unethical for a lawyer to provide an unrepresented party with a document that appears solely to represent the position of the adverse party, such as an answer. *See* CPR 121, CPR 296, RPC 165.

The prohibitions set out in the prior ethics opinions are consistent with Rule

1.7(b)(3), which prohibits a lawyer from representing opposing parties in the same litigation. Providing an opposing party with a response to a complaint, or other responsive pleading, is tantamount to representing that party. Pursuant to RPC 114, when a lawyer gives drafting assistance to a litigant who wishes to proceed *pro se*, an attorney-client relationship is formed and the Rules of Professional Conduct, particularly those concerning confidentiality and conflict of interest, apply.

The affidavit and confession of judgment is not a responsive pleading and does not solely represent the position of Contractor. Rather, the document represents the terms upon which Supply Company is willing to resolve its claim against Contractor. So long as Supply Company's lawyer has explained that he represents an adverse party and is not representing Contractor, Lawyer for Supply Company may negotiate the terms of the settlement and may prepare the document for Contractor's signature.

Inquiry #2:

The waiver of exemptions provides that Contractor has consulted with counsel, has previously executed a confession of judgment in favor of Supply Company, has been advised by counsel of the right to designate property, and has freely, knowingly, and voluntarily waived any and all statutory and constitutional exemptions. May Lawyer for Supply Company prepare the waiver of exemptions to be signed by Contractor and thereafter filed with the court?

Opinion #2:

No. First, the waiver of exemptions may not state that Contractor has consulted with counsel and has been advised by counsel of the right to designate property unless Contractor has actually received such counsel and advice. If Contractor is unrepresented in the matter, the statement cannot be included in the waiver of exemptions.

Second, Lawyer must determine whether a waiver of either the constitutional or statutory exemptions is legally permissible. Statutory and constitutional exemptions may be waived only under specific circumstances as set forth in the statutes and case law. To the extent that any such waiver is not recognized under the

law, Lawyer may not insert such a waiver provision in the documents presented to the unrepresented party.

Finally, if Contractor is unrepresented, it is difficult to imagine how Contractor made a "knowing" waiver of all statutory and constitutional exemptions.

Proposed 2009 Formal Ethics

Opinion 13

Providing Limited Legal Services When Working with a Settlement Agent

October 22, 2009

Proposed opinion rules that a lawyer may provide limited legal services when working with a settlement agent on a residential real estate transaction provided the lawyer is not assisting the settlement agent to engage in the unauthorized practice of law and the lawyer avoids conflicts of interest.

Inquiry #1:

Lawyer J would like to work with a settlement agent, who is not a lawyer, on residential real estate transactions. The settlement agent will be hired by the borrower/buyer to provide the settlement services authorized by N.C. Gen. Stat. §45A-4. The settlement agent is a title agent for the title insurance company that will be issuing the title insurance for each transaction. Pursuant to a "master agreement" with the title insurance company, the settlement agent will send Lawyer J a request for a title opinion, called a "title order form," whenever the settlement agent is hired by a borrower/buyer to settle a transaction.

Once hired to prepare the title opinion, Lawyer J will send a letter to the borrower/buyer stating that Lawyer J was retained by the title company to conduct a title search on the property. The letter will also disclose that Lawyer J represents only the title company but the borrower/buyer may hire Lawyer J or other counsel to represent the borrower/buyer and provide specific services to the borrower/buyer in connection with the closing of the transaction as agreed with the lawyer. The letter will further explain that unless the borrower/buyer hires a lawyer, the borrower/buyer will not be represented on the transaction.

Lawyer J will also notify the seller that he does not represent the seller and the seller will not have representation on the transaction unless he hires Lawyer J or another lawyer. The legal services that Lawyer J's

firm will offer to the seller will include the following: clearing liens or other clouds on the title, drafting the deed and additional documents as needed for the settlement, and contract review.

Lawyer J will hire "an abstractor of its choosing" to search the title under the supervision of the lawyers in his firm. When the abstractor provides the result of his search to the Lawyer J, Lawyer J will draft a preliminary opinion of title for the title company. The preliminary opinion will be "for informational purposes only" unless the borrower/buyer has hired Lawyer J to represent him.

Once the settlement agent has overseen the execution of the closing documents, Lawyer J will update the title prior to recording. The updated title information will be provided to the settlement agent together with a statement that "recording is allowed" (i.e., title will pass as required by the contract). Recording will be handled by the settlement agent, Lawyer J, or a third party. After recording, the settlement agent will make the disbursements from the closing funds provided by the borrower/buyer and the seller as shown on the HUD-1 settlement statement. The settlement statement will disclose payment to Lawyer J from the closing funds. Copies of the recorded documents and recording information will be provided to Lawyer J to prepare a final opinion on title for the title company.

May Lawyer J, or any other lawyer in his firm, limit his services to the representation of the title company for the purpose of abstracting title, issuing a title opinion, and providing advice to the title company unless specifically hired by the seller or the borrower/buyer to provide additional services?

Opinion #1:

Assuming that Lawyer J is not otherwise in violation of N.C. Gen. Stat. §58-26-1(a) or other law¹ and he determines that the settlement agent understands and will stay within the limitations of the services that the settlement agent may legally provide, Lawyer J may limit his representation to the title company as described in the inquiry. See Rule 1.2(c).

No opinion is expressed on the legal questions of whether the proposed activities violate the federal Real Estate Settlement Procedures Act (RESPA), North Carolina

fraudulent practices statutes, or the following provision in N.C. Gen. Stat. §58-26-1(a) which allows a title company to issue an insurance policy on the basis of a title opinion provided by a lawyer who is hired to represent the title company:

Companies may be formed in the manner provided in this Article for the purpose of furnishing information in relation to titles to real estate and of insuring owners and others interested therein against loss by reason of encumbrances and defective title; provided, however, that no such information shall be so furnished nor shall such insurance be so issued as to North Carolina real property unless and until the title insurance company has obtained the opinion of an attorney, licensed to practice law in North Carolina and not an employee or agent of the company, who has conducted or caused to be conducted under the attorney's direct supervision a reasonable examination of the title....

Assuming that a lawyer may be hired by a title company for this purpose, Lawyer J may limit his legal services to representation of the title company as described in the inquiry provided he will not be assisting in the unauthorized practice of law by the settlement agent and further provided the borrower/buyer is not mislead about Lawyer J's limited role in the settlement. A lawyer has a duty of reasonable inquiry to determine that his services are not being used to assist the unauthorized practice of law. This includes asking the settlement agent what activities the settlement agent will perform in relation to the real estate transaction and confirming that the settlement agent will not perform those activities identified as the practice of law in Authorized Practice Advisory Opinion 2002-1. If the lawyer has knowledge that the settlement agent is providing services that constitute the practice of law, the lawyer must cease all participation in the particular transaction and may not participate in any future transaction unless he is satisfied that the settlement agent will not engage in the unauthorized practice of law.

Rule 5.5(d) prohibits a lawyer from assisting another person in the unauthorized practice of law. As explained in Authorized Practice Advisory Opinion 2002-1, there are aspects of a residential real estate closing that

are the practice of law and there are aspects that are not. A nonlawyer settlement agent who is acting pursuant to N.C. Gen. Stat. §45A-4 may perform the following services: (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds. *Id.* Authorized Practice Advisory Opinion 2002-1 also explains that a settlement agent is engaged in unauthorized practice if he performs any of the following functions in connection with a residential real estate closing:

1. Abstracts or provides an opinion on title to real property;
2. Explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effect of an item reported as an exception in a title insurance commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency, or agent may explain an underwriting decision to an insured or prospective insured, including providing the reason for such decision;
3. Explains or gives advice about the rights or responsibilities of parties concerning matters disclosed by a land survey under circumstances that require the exercise of legal judgment or that have implications with respect to a party's legal rights or obligations;
4. Provides a legal opinion or advice in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;
5. Advises or instructs a party to the transaction with respect to alternative ways for taking title to the property or the legal consequences of taking title in a particular manner;
6. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document, or selects or assists a party in selecting a form legal document among several forms having different legal implications;

7. Explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations;

8. Attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations.

Lawyer J also has a duty of reasonable inquiry to determine that his services are not being used to assist other illegal conduct including aiding a third party to direct business to a particular title insurer in violation of N.C. Gen. Stat. §75-17.

To avoid misrepresentation, in the letter to the borrower/buyer, Lawyer J must disclose the scope of his services to the title insurance company and explain how he will be compensated if he is to be paid from the closing funds. If Lawyer J is asked by the borrower/buyer to provide legal representation to the borrower/buyer, Lawyer J must explain the scope of his services for the borrower/buyer and how he will be compensated. Lawyer J may only represent the borrower/buyer if he does not have a conflict of interest that would compromise his competent representation of any of the clients and he obtains the borrower/buyer's informed consent, confirmed in writing, to any potential conflict of interest. Rule 1.7. Lawyer J must fully disclose his representation of the title company and his ongoing business relationship with the settlement agent. This full disclosure must include disclosure of the fact that Lawyer J cannot recommend a title insurance company to the borrower/buyer because his independent professional judgment is compromised by his relationships with the settlement agent and the title company.

Inquiry #2:

If N.C. Gen. Stat. §58-26-1(a) or some other law prohibits a title company from hiring a lawyer to provide the title opinion, Lawyer J proposes an alternative course of action. When Lawyer J receives a title order from the settlement agent, Lawyer J will send an engagement letter to the borrower/buyer stating that Lawyer J will provide limited representation to the borrower/buyer for the purpose of performing the title

work necessary to close the transaction. Borrower/buyer will sign the letter to acknowledge his understanding and consent to the limited representation. The title opinion prepared by Lawyer J will state that the opinion may not be used to issue title insurance unless the borrower/buyer has consented to the representation.

With this change, may Lawyer J provide the services as outlined in Inquiry #1?

Opinion #2:

Lawyer J may provide the services subject to the limitations set forth in Opinion #1 and the requirements for targeted direct mail letters as explained below.

Lawyer J may not send a letter to the borrower/buyer offering his legal services unless he complies with Rule 7.3(c) which requires a solicitation letter to a person known to be in need of legal services in a particular matter to include the advertising disclosure, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" on the envelope of the letter and at the beginning of the body of the letter. The font used for the advertising disclaimer must be as large as the lawyer's or the law firm's name in the letterhead or masthead of the letter.

Endnote

1. The lawyer shall not participate in any such relationship if she knows or should know that it violates the legal requirements relating to referral of business, disclosure of affiliated relationships, or informed consent to affiliated relationships. See, e.g., N.C. Gen. Stat. §§58-3-135, 58-27-5, 58-63-15, or 75-17.

Proposed 2009 Formal Ethics

Opinion 14

Referral of Clients to Title Insurance Agency in Which Lawyer's Spouse Has an Ownership Interest

October 22, 2009

Proposed opinion rules that a lawyer may refer a client to the title insurance agency in which lawyer's spouse has an ownership interest if he determines his professional judgment when making the referral was not impaired by the spouse's financial interests and the client gives informed consent.

Inquiry:

May Lawyer, representing both the buyer/borrower and the lender in a real estate transaction prepare a title opinion for a title insurance agency in which Lawyer's spouse has an ownership interest?

Opinion:

Yes. Rule 1.7 provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation of one or more clients may be materially limited by a personal interest of the lawyer. Rule 1.7(a)(2). However, under certain conditions, a concurrent conflict of interest may be waived. Pursuant to Rule 1.7(b), a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and each affected client gives informed consent, confirmed in writing.

The instant scenario presents two ethical concerns under Rule 1.7(a). The first concern is that Lawyer's personal interest will prevent him from making an independent professional judgment about where to place the title insurance. The second concern is that Lawyer's personal interest in having his spouse's company receive a commission could conflict with Lawyer's duty to close the transaction only if it is in the clients' best interest. Given the concurrent conflict of interest, the issue is whether the conflict of interest is consentable.

In RPC 188, the Ethics Committee concluded that a similar conflict of interest was consentable. RPC 188 holds that a lawyer may represent the buyer and/or lender in a real estate transaction brokered by the lawyer's spouse, although the lawyer's spouse will receive a valuable commission only if the real estate transaction goes forward. The opinion provides that the lawyer may proceed with the representation if the lawyer "reasonably believes his judgment will not be adversely affected by his relationship with his wife and all clients consent to Lawyer's participation after full disclosure of this relationship and the risks involved."

In the instant scenario, Lawyer must initially make a determination that his independent legal judgment will not be adversely affected by his financial relationship with his spouse and that a referral to the title insurance agency in which Lawyer's spouse has an ownership interest is consistent with

the interest of the client(s). If Lawyer makes such a determination, Lawyer must then obtain the client(s)' informed consent confirmed in writing to the referral after disclosing his spouse's financial interest in the transaction, any potential conflicts of interest inherent in the situation, and that the same services could be obtained from other title insurance companies.

No opinion is expressed on the legal question of whether the fact scenario violates N.C.G.S. § 58-27-5(a), which provides in part that no person performing services as an attorney, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission, or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement; nor shall any title insurance company, agency, or agent make any such payment.

**Proposed 2009 Formal Ethics
Opinion 15
Dismissal of DWI Charge by
Prosecutor When Insufficient
Evidence Due to Suppression Order
October 22, 2009**

Proposed opinion rules that a prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop thereby eliminating the evidence necessary to prove the charge.

Inquiry:

In a Driving While Impaired (DWI) case in district court, a defendant makes a pretrial motion to suppress all evidence obtained from the stop of his vehicle pursuant to N.C. Gen. Stat. §20-38.6(a). After considering the evidence offered at the pretrial hearing, the district court judge enters an order pursuant to N.C. Gen. Stat. §20-38.6(f) indicating his/her preliminary inclination to grant the defendant's pretrial motion because the stop was unconstitutional in violation of the Fourth Amendment. The prosecutor does not appeal this preliminary ruling to superior court and the district court judge's decision becomes a final judgment pursuant to the statute. The district court judge enters a final order suppressing the evidence from the vehicle stop. The evidence from the vehicle stop was the only

evidence of the alleged crime. The case is re-calendared.

May the prosecutor call the case for trial, arraign the defendant (who pleads not guilty), call no witnesses or otherwise offer evidence, and rest the case, thus requiring the judge to dismiss the case; or does the prosecutor have an ethical duty to dismiss the case after all evidence of guilt is suppressed pursuant to the pretrial motion?

Opinion:

A lawyer has an ethical duty, under Rule 3.1, not to bring a proceeding unless there is a basis in law and in fact for doing so that is not frivolous. In light of this duty, a prosecutor who knows that she has no admissible evidence supporting a DWI charge to present at trial must dismiss the charge prior to calling the case for trial.

**Proposed 2009 Formal Ethics
Opinion 16
References to Selected Trial and
Other Successes on Website
October 22, 2009**

Proposed opinion rules that a law firm must include a disclaimer and make known specified information about any trial or other professional success referenced on a website.

Inquiry #1:

2003 FEO 3 states that a lawyer may only advertise his membership or participation in an organization with a self-laudatory name or designation if certain conditions are satisfied. Does 2003 FEO 3 apply to a lawyer's individual biography on his firm's website?

Opinion #1:

Yes. 2003 FEO 3 states that a lawyer may only advertise his membership or participation in an organization with a self-laudatory name or designation if the following conditions are satisfied: (1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership; (2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided

in the advertisement; (3) the organization has no financial interest in promoting the particular lawyer; and (4) the organization charges the lawyer only reasonable membership fees. Any reference to membership in such an organization must comply with the requirements of 2003 FEO 3. The use of a footnote that includes the standards for membership or information on how to obtain the membership standards is acceptable. *See also* 2007 FEO 14 (allowing lawyer to advertise his inclusion in the North Carolina Super Lawyers list but not to claim that he is a "super lawyer").

Inquiry #2:

Does 2003 FEO 3 apply to a firm's general reference to such membership on its website, such as "ten of our lawyers were included in the Legal Elite"?

Opinion #2:

Yes. *See* Opinion #1 and 2007 FEO 14.

Inquiry #3:

2009 FEO 6 provides that a law firm website may include a "case summary" section if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a). Under 2009 FEO 6, are the following types of information permitted on a firm website:

- a lawyer's biography referencing a single trial victory in a well-known case or the successful handling of a specific matter;
- a lawyer's biography providing a list of his reported cases, but not including unfavorable reported cases; or
- a lawyer's biography listing "representative matters handled," "recent cases," "recent experience," or the like but only including matters that were favorably resolved for the lawyer's clients?

Opinion #3:

2009 FEO 6 provides that there must be sufficient information about each case referenced on a law firm webpage to comply with Rule 7.1(a). The opinion requires "case summary" sections highlighting past successes to explain the complexity of the matter; whether liability and/or damages were contested; whether the opposing party was represented by legal counsel; and, if applicable, the firm's success in actually collecting the judgment.

References to a single trial victory; to

the successful handling of a specific matter; and to favorable reported cases, recent cases or experience, are permissible with a footnote providing the information required by 2009 FEO 6. Directing the consumer to a "case summary" section on the website, which section contains the required information, is acceptable. The references must also include a disclaimer to the effect that the listed cases or matters may not represent the lawyer's entire record and that the outcome of a particular case cannot be predicated upon a lawyer's or a law firm's past results.

Inquiry #4:

Under 2009 FEO 6, are the following types of information permitted on a firm website:

- a lawyer's biography stating that the lawyer has successfully represented numerous corporations or individuals;
- a lawyer's biography stating that the lawyer has argued and won numerous cases before the North Carolina appellate courts without stating that he has also lost cases before the appellate courts; or
- a lawyer's biography stating that the lawyer has successfully handled cases in a specific area of the law without stating that he has also been unsuccessful on cases in that area of the law?

Opinion #4:

Statements that a lawyer has "successfully represented numerous corporations or individuals," has "argued and won numerous cases before the North Carolina appellate courts," and has "successfully handled cases in a specific area of the law," are acceptable if the statements are accompanied by the information on specific cases and matters as required by 2009 FEO 6 and a disclaimer to the effect that the statements may not reflect the lawyer's entire record and that the outcome of a particular case cannot be predicated upon a lawyer's or a law firm's past results.

In 2000 FEO 1, the Ethics Committee considered the statement on a law firm's website that the lawyers in the law firm's medical malpractice group had been "enormously successful, consistently obtaining verdicts and settlements for their clients that are among the largest reported North Carolina verdicts and settlements each year." The Ethics Committee found that the sub-

jective statement was misleading because it created unjustified expectations.

Providing specific information about the factual and legal circumstances of the cases reported, in conjunction with the inclusion of an appropriate disclaimer, precludes a finding that these statements are likely to create unjustified expectations or otherwise mislead a prospective client.

Proposed 2009 Formal Ethics

Opinion 17

Tacking as Question of Standard of Care October 22, 2009

Proposed opinion rules that whether a lawyer rendering a title opinion to a title insurer should tack to an owner's policy of title insurance or a mortgagee's (lender's) policy is a question of standard of care and outside the purview of the Ethics Committee.

Inquiry:

A lending institution acquires title to real properties through foreclosures or deeds in lieu of foreclosure. The institution (Seller) enters into contracts to sell these properties to third parties. The standard contract used by Seller requires the buyer to execute a real estate purchase addendum that states that Seller has the right to designate the providers of title and escrow/closing services and that Seller will pay for a standard ALTA Home Owners Policy of title insurance. The title insurance company used by Seller is an affiliate of Seller.

Law Firm is routinely designated by Seller as the settlement agent for these transactions. Law Firm advises a buyer that Law Firm has been chosen as settlement agent by Seller and, although it will be paid by the buyer at closing, Law Firm does not represent the buyer. Law Firm also explains that it will obtain the title insurance policy for the buyer and the premium will be paid by Seller.

To render the title opinion required for the issuance of the title policy, Law Firm uses the mortgagee title policy obtained by Seller at the time Seller issued the original loan that ultimately went into default and led to the foreclosure and repurchase of the property by Seller. Law Firm renders an opinion on title to the title insurance company by updating the title from ("tacking to") the mortgagee title policy. The title insurance company does not object.

RPC 99 holds that the Rules of Professional Conduct do not require personal inspection of all documents in the chain of title so long as the lawyer rendering the opinion fully discloses to the client (the buyer) the precise nature and extent of the service being rendered. The opinion further states, "Since title insurers frequently omit exceptions in mortgagees' policies that would appear in owners' policies, tacking should be limited to tacking onto owners' policies."

May Law Firm render a title opinion to a title insurance company by tacking to a mortgagee's (lender's) title insurance policy?

Opinion:

The issue of appropriate standard of care for rendering a title opinion is outside the purview of the Ethics Committee. To the extent that RPC 99 appeared to opine on the standard of care relative to tacking to an owner's policy versus a mortgagee's (lender's) policy for the purpose of rendering a title opinion, that part of the opinion is withdrawn.

Whether tacking to an owner's policy or a mortgagee's policy, a lawyer's duty is to provide competent representation to his client, consistent with Rule 1.1, and to reasonably consult with the client about the means used to accomplish the client's objectives. Rule 1.4(a)(2). If a lawyer is representing a buyer in a real estate transaction, the lawyer must consult with the buyer before using a method of rendering a title opinion that might present additional risk for the buyer.

The problem in the current inquiry is that Law Firm does not represent the buyer as a client and, therefore, has no duty to consult with the buyer about whether tacking to a mortgagee's policy is in the best interest of the buyer. Nevertheless, Law Firm does have duties of fairness and honesty particularly when dealing with an unrepresented person. Therefore, Law Firm should disclose to an unrepresented buyer the procedure that will be used to update title and should advise the buyer to consult a lawyer about whether the procedure provides adequate protection to the buyer. See e.g. Rule 4.1 and Rule 4.3. If the buyer hires a lawyer, that lawyer must advise the buyer on whether the buyer needs to obtain another title opinion or an owner's policy of title insurance. ■

Amendments Approved by the Supreme Court

At a conference on October 8, 2009, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar:

Amendments to the Rules on Discipline and Disability

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The amendments to the discipline rules revise the existing rule limiting the time period for filing grievances and provide guidelines for the Grievance Committee and for the Disciplinary Hearing Commission when imposing discipline. In addition, to reduce confusion, the word "panel" is substituted for the word "committee" whenever the latter word is used in this section to refer to a three-member panel of the Disciplinary Hearing Commission presiding over a public hearing.

Amendments to the Procedures for Administrative Suspension

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The amendments to the rules on administrative suspension for failure to timely fulfill a duty of membership require a lawyer who is served with an order of suspension to wind down his or her law practice within 30 days

after the order goes into effect. The wind-down obligations are the same as those imposed when a lawyer receives a disciplinary suspension or is disbarred and failure to fulfill the wind-down obligations may subject a member to professional discipline.

Other amendments eliminate the recitation of the obligations of membership enforceable under the administrative suspension rule in favor of a generic reference thereto and eliminate the requirement of service pursuant to Rule 4 of the Rules of Civil Procedure in favor of service by registered or certified mail at the member's last address on record with the State Bar.

Amendments to the Regulations Governing the Administration of the Continuing Legal Education Program

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The amendments increase the fee charged to sponsors and attendees of approved CLE courses (to \$3.00) to support the activities of the Chief Justice's Equal Access to Justice Commission. A portion of the increase (\$0.25) will be retained by the State Bar to defray the costs it incurs collecting and accounting for the fee.

Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

To incentivize timely submissions, the proposed amendment imposes a \$25.00 late fee for delinquent applications for recertification.

Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15, Safeguarding Property

The amendment deletes the term "credit union" from the definition of what is considered a "bank" because the deposits of clients held in a credit union trust account are not covered by federal deposit insurance unless the clients are themselves members of the credit union.

The court has taken no action on the following proposed rule amendment:

Proposed Amendments to the Rules on Discipline and Disability

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The proposed amendments provide for enhanced disciplinary sanctions as a function of prior discipline.

Amendments Pending Approval by the Supreme Court

At its meeting on October 23, 2009, the council of the North Carolina State Bar voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed amendments, see the Fall 2009 edition of the *Journal* or visit the State Bar website, www.ncbar.gov):

Proposed Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals, and Section .0200, Continuing Paralegal Education

The proposed amendments make the following changes to the rules governing the State Bar's program to certify paralegals: (1) recognize that a Juris Doctor degree from an ABA-accredited law school satisfies the educational requirements for certification; (2) substitute the correct names for the organizations formerly known as the North Carolina Academy of Trial Lawyers and the North Carolina Bar Association Legal Assistants Division; and (3) prohibit continuing paralegal education (CPE) credit for self-study except for courses taken on-line.

Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 6.1, Voluntary Pro Bono Publico Service

The addition of Rule 6.1 to the Rules of Professional Conduct is proposed. The new rule declares that a lawyer has a professional responsibility to render pro bono legal services. The proposed rule is not mandatory and sets forth only an aspirational goal for each lawyer to perform at least 50 hours of pro bono work annually.

Proposed Amendments

At its meeting on October 22, 2009, the Executive Committee of the council accepted the report and recommendation of the Ethics Committee to withdraw proposed amendments to Rule 1.8 and Rule 3.8 of the Rules of Professional Conduct. These proposed amendments were originally published for comment in the Spring 2009 edition of the *Journal*. The proposed amendments to Rule 1.8 allowed a lawyer to provide financial assistance to an indigent client subject to certain conditions. The proposed amendments to Rule 3.8 required a prosecutor, under certain circumstances, to report information concerning a possible wrongful conviction. Upon the recommendation of the staff, the Executive Committee also withdrew proposed amendments to the rules on the organization of judicial district bars which were published for comment in the Fall 2009 edition of the *Journal*. The proposed amendments provided that judicial district bar dues are not payable during the year of admission to the State Bar by examination.

At its meeting on October 23, 2009, the council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Elimination of the Rule Requiring Certification of Insurance Coverage

27 N.C.A.C. 1A, Section .0200, Membership—Annual Membership Fees

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

Since 2004, every member is required annually to submit a certificate stating whether the member is engaged in the private practice of law and, if so, whether the member is covered by a policy of professional liability insurance. The information is made available to the public on the State Bar's website. Upon reflection, it does not appear that the information is sufficiently useful or reliable to justify the cost of its collection and publication. For this reason, it is proposed that the requirement be eliminated by the deletion of the enabling rule in its entirety. The rule is not republished here but can be viewed on the State Bar website (www.ncbar.gov) or in the *Lawyers Handbook*. The complete citation for the

rule is 27 N.C.A.C. 1A, Rule .0204, Certificate of Insurance Coverage.

To eliminate the duty to file a certificate of insurance, it is proposed that the rule on suspension for failure to fulfill obligations of membership also be amended as shown below.

Subchapter 1D, Section .0900

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

....

(1) The following are examples of obligations of membership that will be enforced by administrative suspension. This list is illustrative and not exclusive:

(A)

~~(D) Filing of the certificate of insurance coverage as required in Rule .0204 of subchapter 1A of these rules;~~

~~(D)(E)~~

[Reletter remaining subparagraphs]

(b)

Proposed Amendment to the Procedures for the Ethics Committee

27 N.C.A.C. 1D, Section .0100, Procedures for Ruling on Questions of Legal Ethics

The Program Evaluation Committee, an ad hoc committee of the council appointed in January by then-President John McMillan to evaluate and make recommendations for the improvement of existing State Bar programs, gave its report and recommendations to the council at the October meeting. After analyzing the procedures of the Ethics Committee, the Program Evaluation Committee recommended the publication of a rule codifying a procedure for a consent agenda to remove items from the Ethics Committee's agenda that do not warrant discussion by the full committee.

NOTE: This is an entirely new rule. Bold print is not, therefore, used to show changes.

.0105 Procedures for Meetings of the Ethics Committee

(a) Consent Agenda. The agenda for a meeting of the committee shall include a consent agenda consisting of those proposed formal ethics opinions, proposed

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal*. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

ethics decisions, and ethics advisories (collectively "proposed opinions") published, circulated, or mailed during the preceding quarter that the chairperson, vice-chair, and staff counsel agree do not warrant discussion by the full committee.

(b) Vote on Consent Agenda. The consent agenda shall be considered at the beginning of the meeting of the committee following the consideration of administrative matters. Any committee member may make a non-debatable motion to remove an item from the consent agenda for separate discussion and vote. The motion must receive an affirmative vote of one-third of all of the duly appointed members of the committee in order for an item to be removed from the consent agenda. The items remaining upon the consent agenda shall be considered together upon a non-debatable motion to approve the remaining items on the consent agenda. The motion must pass by a vote of not less than a majority of the duly appointed members of the committee pursuant to Rule .0104(f) of this subchapter. All items on a consent agenda so approved shall be

transmitted to the council with a recommendation to adopt.

Proposed Amendments to the Rules Governing the Attorney Client Assistance Program

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

Upon the recommendation of the Program Evaluation Committee, it is proposed that the standing committee in charge of the Attorney Client Assistance Program be eliminated and the program continue to operate under the auspices of the Grievance Committee. Changes to the operating rules for the fee dispute resolution program are also recommended to make the rules more accurately reflect the actual procedures and functioning of the program.

Subchapter 1A, Section .0700

.0701 Standing Committees and Boards

(a) Standing Committees.

....

(1) Executive Committee.

....

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in panels subcommittees as assigned by the president. Each panel subcommittee shall have at least ten members. Two members of each panel subcommittee shall be nonlawyers, one member may be a lawyer who is not a member of the council, and the remaining members of each panel subcommittee shall be councilors of the North Carolina State Bar. A quorum of a panel subcommittee shall be five members serving at a particular time. One subcommittee shall oversee the Attorney Client Assistance Program. It shall be the duty of the Attorney Client Assistance subcommittee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D

of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate. Each panel subcommittee shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances, fee disputes, and other matters referred to it by the chairperson of the Grievance Committee. Each panel subcommittee member shall be furnished a brief description of all matters referred to other panels subcommittees (and such other available information as he or she may request) and be given a reasonable opportunity to provide comments to such other panels subcommittees. Each panel's subcommittee's decision respecting the grievances, fee disputes, and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a panel subcommittee decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another panel subcommittee. The president shall designate a vice-chairperson to preside over, and oversee the functions of each panel subcommittee. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) Authorized Practice Committee.

....

(7) Attorney Client Assistance Committee. It shall be the duty of the Attorney Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as

the council or the president may designate.
~~(8)~~ (7) Legal Assistance for Military Personnel (LAMP) Committee.

....

[ReNUMBER remaining paragraphs]

Subchapter 1D, Section .0700

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program ~~shall be to assist lawyers and clients to~~ is to help clients and lawyers settle disputes over fees. In doing so, the Fee Dispute Resolution Program shall assist the lawyers and clients in determining the appropriate fee for legal services rendered. The State Bar shall implement the Fee Dispute Resolution Program under the auspices of ~~the Attorney Client Assistance Committee (the committee)~~ the Grievance Committee (the committee) and administered by the Attorney Client Assistance Program (ACAP), which shall will be offered to clients and their lawyers at no cost. A person other than the client who pays the lawyer's legal fee or expenses may file a fee dispute petition. The person who paid the fees or expenses will not be permitted to participate in the fee dispute resolution process.

.0702 Jurisdiction

~~The committee shall have jurisdiction over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney.~~

~~The committee shall not have jurisdiction over the following:~~

~~1. disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;~~

~~2. disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;~~

~~3. fee disputes that are or were the subject of litigation;~~

~~4. fee disputes between lawyers and service providers, such as court reporters and expert witnesses;~~

~~5. fee disputes between lawyers and individuals with whom the lawyer had no client-lawyer relationship, except in those case where the fee has been paid by a person other than the client; and~~

~~6. disputes concerning fees charged for~~

ancillary services provided by the lawyer not involving the practice of law.

The committee shall encourage mediated settlement of fee disputes falling within its jurisdiction pursuant to Rule .0706 of this subchapter.

(a) The committee has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

- (1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;
- (2) a dispute involving services that are the subject of a pending grievance complaint alleging violation of the Rules of Professional Conduct;
- (3) a dispute over fees or expenses that are or were the subject of litigation unless
 - (i) a court directs the matter to the State Bar for mediation, or
 - (ii) both parties to the dispute agree to dismiss the litigation without prejudice and pursue mediation;
- (4) a dispute between a lawyer and a service provider, such as a court reporter or an expert witness;
- (5) a dispute between a lawyer and a person or entity with whom the lawyer had no client-lawyer relationship, except that the committee has jurisdiction over a dispute between a lawyer and a person other than the lawyer's client who paid fees or expenses to the lawyer for the benefit of the client; and
- (6) a dispute concerning a fee charged for services provided by the lawyer that do not constitute the practice of law.

The committee will encourage settlement of fee disputes falling within its jurisdiction pursuant to Rule .0708 of this subchapter.

.0703 Coordinator of Fee Dispute Resolution

The secretary-treasurer of the North Carolina State Bar shall will designate a member of the staff to serve as coordinator of the Fee Dispute Resolution Program. The coordinator shall will develop forms, maintain records, and provide statistics on the Fee Dispute Resolution Program. The coordinator shall will also develop an annual report to the

council. The coordinator may also serve as a facilitator.

.0704 Reserved Confidentiality

The existence of and content of any petition for resolution of disputed fee and of any lawyer's response to a petition for resolution of a disputed fee are confidential.

.0705 Selection of Mediators/Facilitators

The State Bar will select a pool of qualified mediators. Selected mediators shall be certified by the North Carolina Dispute Resolution Commission or have a minimum of three (3) years experience as a mediator.

The secretary-treasurer of the North Carolina State Bar will designate members of the State Bar staff to serve as facilitators.

.0706 Processing Requests for Fee Dispute Resolution Powers and Duties of the Vice-Chairperson

(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30 day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the matter is not presently the subject of litigation. All requests for resolution of a disputed fee must be filed before the statute of limitation has run or within three years of the ending of the client/attorney relationship, whichever comes last.

(b) The coordinator of fee dispute resolution or his/her designee shall investigate the request to determine its suitability for fee dispute resolution. If it is determined that the matter is not suitable for fee dispute resolution,

the coordinator shall prepare a brief written report setting forth the facts and a recommendation for dismissal. Grounds for dismissal include, but are not limited to, the following:

- (1) the request is frivolous or moot;
- (2) the absence of jurisdiction; or
- (3) the facts as stated support the conclusion that the fee was earned and is not excessive.

The report shall be forwarded to the chairperson of the committee. If the chairperson of the Attorney Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.

(c) If the chairperson disagrees with the recommendation for dismissal, an attempt to resolve the dispute will be made pursuant to Rule .0707 below or the chair may recommend review by the full committee.

The vice-chairperson of the Grievance Subcommittee overseeing ACAP, or his/her designee, who must be a councilor, will:

- (a) approve or disapprove all recommendations that a petition for resolution of disputed fee be dismissed;
- (b) call and preside over meetings of the committee; and
- (c) refer to the Grievance Committee all cases in which it appears to the vice chairperson that (i) a lawyer might have charged, contracted to receive or received an illegal or clearly excessive fee or a clearly excessive amount for expenses or (ii) a lawyer might have failed to refund an unearned portion of a fee in violation of Rule of Professional Conduct 1.5, or (iii) a lawyer might have violated one or more Rules of Professional Conduct other than or in addition to Rule 1.5.

.0707 Mediation Proceedings Processing Requests for Fee Dispute Resolution

(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.

(b) The attorney against whom a request for fee dispute resolution is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.

(c) ~~The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator may communicate privately with any participant prior to and during the conference. Any private communication with a participant shall be disclosed to all other participants at the beginning of the conference. The mediator shall define and describe the following at the beginning of the conference:~~

- ~~(1) the process of mediation;~~
 - ~~(2) the differences between mediation and other forms of conflict resolution;~~
 - ~~(3) that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;~~
 - ~~(4) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;~~
 - ~~(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;~~
 - ~~(6) The duties and responsibilities of the mediator and the participants; and~~
 - ~~(7) That any agreement reached will be reached by mutual consent, reduced to writing and signed by all parties.~~
- ~~The mediator has a duty to be impartial and advise all participants of any circumstance bearing on possible bias, prejudice, or partiality. It is the duty of the mediator timely to determine and declare that an impasse exists and that the conference should end.~~

(a) Requests for resolution of a disputed fee must be submitted in writing to the coordinator of the Fee Dispute Resolution Program addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. A lawyer is required by Rule 1.5 of the Rules of Professional Conduct to notify in writing a client with whom the lawyer has a dispute over a fee of the existence of the Fee Dispute Resolution Program and to wait at least 30 days after the client receives such notification before filing a lawsuit to collect a disputed fee. A lawyer may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client only if such filing is necessary to preserve a claim. If a lawyer does file a lawsuit pursuant to the preceding sentence, the lawyer must not take steps to pursue the litigation until the fee dispute resolution process is completed. A client

may request fee dispute resolution at any time before either party files a lawsuit. The petition for resolution of a disputed fee must contain:

- (1) the names and addresses of the parties to the dispute;
 - (2) a clear and brief statement of the facts giving rise to the dispute;
 - (3) a statement that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement;
 - (4) a statement that the subject matter of the dispute has not been adjudicated and is not presently the subject of litigation.
- (b) All petitions for resolution of a disputed fee must be filed (i) before the expiration of the statute of limitation applicable in the General Court of Justice for collection of the funds in issue or (ii) within three years of the termination of the client-lawyer relationship, whichever is later.

(c) The coordinator of Fee Dispute Resolution Program or the facilitator will investigate the petition to determine its suitability for fee dispute resolution. If it is determined that the dispute is not suitable for fee dispute resolution, the coordinator and/or the facilitator will prepare a dismissal letter setting forth the facts and a recommendation for dismissal. The coordinator and/or the facilitator will forward the dismissal letter to the vice-chairperson. If the vice chairperson agrees with the recommendation, the petition will be dismissed. The coordinator and/or facilitator will notify the parties in writing of the dismissal. Grounds for dismissal include, but are not limited to, the following:

- (1) the petition is frivolous or moot;
 - (2) the committee lacks jurisdiction over one or more of the parties or over the subject matter of the dispute;
 - (3) the fee has been earned; or
 - (4) the expenses were properly incurred.
- (d) If the vice-chairperson disagrees with the recommendation for dismissal, the coordinator will schedule a settlement conference.

.0708 Finalizing the Agreement Settlement Conference Proceedings

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel, if any, prior to leaving the conference.

- (a) The coordinator will assign the case to

a facilitator.

(b) The facilitator will send a Letter of Notice to the lawyer by certified mail. The Letter of Notice will include a copy of the petition and any documents the petitioner included with the petition.

(c) Within 15 days after the Letter of Notice is served upon the lawyer, the lawyer must provide a written response to the petition. The facilitator is authorized to grant requests for extensions of time to respond. The lawyer's response must be a full and fair disclosure of all the facts and circumstances pertaining to the dispute. The facilitator will provide a copy of the lawyer's response to the client unless the lawyer objects in writing.

(d) The facilitator will conduct an investigation.

(e) The facilitator will conduct a telephone settlement conference between the parties. The facilitator is authorized to carry out the settlement conference by separate telephone calls with each of the parties or by conference calls, depending upon which method the facilitator believes has the greater likelihood of success.

(f) The facilitator will define and describe the following to the parties:

- (1) the procedure that will be followed;
- (2) the differences between a facilitated settlement conference and other forms of conflict resolution;
- (3) that the settlement conference is not a trial;
- (4) that the facilitator is not a judge;
- (5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;
- (6) the circumstances under which the facilitator may communicate privately with any of the parties or with any other person;
- (7) whether and under what conditions private communications with the facilitator will be shared with the other party or held in confidence during the conference; and
- (8) that any agreement reached will be reached by mutual consent.

(g) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible

bias, prejudice, or partiality.

(h) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

(i) Upon completion of the settlement conference, the facilitator will prepare a disposition letter to be sent to the parties detailing:

(1) that the settlement conference resulted in a settlement and the terms of settlement; or

(2) that the settlement conference resulted in an impasse.

.0709 Record Keeping

The coordinator of fee dispute resolution ~~shall will~~ keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the client's name;

(2) ~~date of the request; the date the petition was received;~~

(3) the lawyer's name;

(4) the district in which the lawyer resides or maintains a place of business;

(5) ~~how the dispute was resolved (dismissed for non merit, mediated agreement, arbitration, etc.);~~ what action was taken on the petition and, if applicable, how the dispute was resolved; and

(6) ~~the time necessary to resolve the dispute; the date the file was closed.~~

.0710 District Bar Fee Dispute Resolution

For the purpose of resolving disputes involving attorneys residing or doing business in the district, any district bar may adopt a fee dispute resolution program, subject to the approval of the council, which shall operate in lieu of the program described herein. Although such programs may be tailored to accommodate local conditions, they must be offered without cost, comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter, and be consistent with the provisions of Rules .0706 and .0707. Subject to the approval of the council, any judicial district bar may adopt a fee dispute resolution program for the purpose of resolving disputes involving lawyers residing or doing business in the district. The State Bar does not offer arbitration as a form of dispute resolution. The judicial district bar may offer arbitration to resolve a disputed fee. A judicial district bar fee dis-

pute resolution program shall have jurisdiction over disputes that would otherwise be addressed by the State Bar's ACAP department. Such programs may be tailored to accommodate local conditions but they must be offered without cost and must comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter.

.0711 District Bar Settlement Conference Proceedings

(a) The chairperson of the judicial district bar fee dispute committee will assign the case to a facilitator who will conduct a settlement conference. The facilitator is responsible for arranging the settlement conference at a time and place convenient to all parties.

(b) The lawyer who is named in the petition must attend the settlement conference in person and may not send a representative in his or her place. If a party fails to attend a settlement conference without good cause, the facilitator may either reschedule the settlement conference or recommend dismissal of the petition.

(c) The facilitator must at all times be in control of the settlement conference and the procedures to be followed. The facilitator may communicate privately with any participant prior to and during the settlement conference. Any private communication with a participant will be disclosed to all other participants at the beginning of the settlement conference or, if the private communication occurs during the settlement conference, immediately after the private communication occurs. The facilitator will explain the following at the beginning of the settlement conference:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;

(6) the circumstances under which the facilitator may meet and communicate privately with any of the parties or with any other person;

(7) whether and under what conditions communications with the facilitator will

be held in confidence during the settlement conference;

(8) that any agreement reached will be reached by mutual consent; and

(9) that, if the parties reach an agreement, that agreement will be reduced to writing and signed by the parties and their counsel, if any, before the parties leave the settlement conference.

(d) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(e) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

Proposed Amendments to the Procedures for the Administrative Committee

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The proposed rule amendments will empower the secretary of the State Bar (i.e., the executive director) to reinstate a member who has been administratively suspended upon the member's satisfaction of all membership obligations, the payment of all associated fees, and the executive director's determination that there are no persisting issues relating to the member's character or fitness.

.0904 Compliance After Suspension for Failure to Fulfill Obligations of Membership

(a) Reinstatement Within 30 Days of Service of Suspension Order. A member who receives an Order of Suspension for failure to comply with an obligation of membership may preclude the order from becoming effective by submitting a written request and satisfactory showing within 30 days after service of the suspension order that the member has complied with or fulfilled the obligations of membership set forth in the order, and has paid the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a \$125 the reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order.

....

(c) Contents of Reinstatement Petition

....

(d) Procedure for Review of Reinstatement Petition

....

(e) Reinstatement by Secretary of the State Bar. At any time after the effective date of a suspension order and prior to the next meeting of the Administrative Committee, a suspended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f).

Proposed Amendments to the IOLTA Rules

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

Upon the recommendation of the Issues Committee, proposed rule amendments to implement interest rate comparability for the IOLTA program are published for comment. A proposed new rule requires lawyers to maintain their IOLTA accounts only at banks that agree to pay the same interest on IOLTA accounts that is paid by the bank on similar accounts of the bank's other customers. The remaining proposed amendments clarify the requirements for a bank to be "eligible" to maintain IOLTA accounts and explain what are reasonable service charges and fees for an IOLTA account.

.1316 IOLTA Accounts

(a) IOLTA Account Defined. Pursuant to order of the North Carolina Supreme Court, every general trust account, as defined in the Rules of Professional Conduct, ~~maintained by a lawyer or law firm~~ must be an interest ~~or dividend-bearing~~ account. (As used herein, "interest" shall refer to both interest and dividends.) Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay

(subject to any notice period that the bank is required to reserve by law or regulation). For the purposes of these rules, ~~these general, interest-bearing trust~~ such accounts shall be known as "IOLTA ~~a~~Accounts" (also referred to as "Accounts").

(b) Eligible Banks. ~~Every lawyer must insure that all general trust accounts maintained by the lawyer or law firm are interest bearing. Lawyers may maintain one or more IOLTA Account(s) only at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this subchapter (Eligible Banks). The determination of whether a bank is eligible shall be made by NC IOLTA, which shall maintain a list of participating Eligible Banks available to all members of the State Bar. A bank that fails to meet the requirements of this subchapter shall be subject only to termination of its eligible status by NC IOLTA. A violation of this rule shall not be the basis for civil liability.~~

(c) ~~Every lawyer must comply with all the administrative requirements of this rule, including the certification required in Rule .1318 below~~

(~~dc~~) Notice Upon Opening or Closing IOLTA Account. Every lawyer or law firm maintaining IOLTA ~~a~~Accounts shall advise NC IOLTA of the establishment or closing of each IOLTA ~~a~~Account. Such notice shall include (i) the name of the bank where the ~~a~~Account is ~~established~~ maintained, (ii) the name of the ~~a~~Account, (iii) the bank ~~a~~Account number, and (iv) the name and bar number of the lawyer(s) in the firm. The North Carolina State Bar shall furnish to each lawyer or law firm maintaining an IOLTA ~~a~~Accounts a suitable plaque ~~or scroll~~ explaining the program, which plaque ~~or scroll~~ shall be exhibited in the office of the lawyer or law firm.

(~~ed~~) Directive to Bank. Every lawyer or law firm maintaining North Carolina IOLTA ~~a~~Accounts ~~for North Carolina client funds~~ shall direct ~~the any~~ bank in which an IOLTA ~~a~~Account is maintained to:

(1) remit interest ~~or dividends~~, less any deduction for ~~permissible~~ allowable reasonable bank service charges; ~~or fees, and taxes~~ (as used herein, "service charges" shall include any charge or fee charged by a bank on an IOLTA Account) as defined in paragraph (e), ~~collected with respect to~~

the deposited funds, at least quarterly to NC IOLTA, ~~at the North Carolina State Bar.~~ If the bank does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed, but only against accrued interest. Business costs or costs billable to others are the responsibility of the lawyer or law firm and may not be charged against client funds or the interest earned by an IOLTA account but may be deducted from the firm's operating account, billed to the firm, or deducted from funds maintained or deposited by the lawyer in the IOLTA account for that purpose. Such costs include but are not limited to NSF fees, wire transfer fees, stop payment orders, account reconciliation, negative collected balances, and business services, such as remote capture capability, on-line banking, digital imaging, and CD-ROM statements.

(2) transmit with each remittance to NC IOLTA ~~at the North Carolina State Bar~~ a statement showing for each Account: (i) the name of the law firm or lawyer maintaining the ~~a~~Account with respect to which the remittance is sent, (ii) the lawyer or law firm's IOLTA Account number, (iii) the earnings period, (iv) the average balance of the Account for the earnings period, (v) the type of Account, (vi) ~~and~~ the rate of interest applied in computing the remittance, (vii) the amount of any service charges for the earnings period, and (viii) the net remittance for the earnings period; ~~and~~

(3) transmit to the law firm or lawyer maintaining the ~~a~~Account ~~at the same time~~ a report showing the amount remitted to NC IOLTA ~~at the North Carolina State Bar~~, the earnings period, and the rate of interest applied in computing the remittance.

(e) Allowable Reasonable Service Charges. Eligible Banks may elect to waive any or all service charges on IOLTA Accounts. If a bank does not waive service charges on IOLTA Accounts, allowable reasonable service charges may be assessed but only against interest earned on the IOLTA Account or funds deposited by the lawyer or law firm in the IOLTA Account for the purpose of paying such charges. Allowable reasonable service charges may be deducted from interest on an IOLTA Account only at the rates and in accordance with the bank's standard practice

for comparable non-IOLTA accounts. Allowable reasonable service charges for IOLTA Accounts are: (i) a reasonable Account maintenance fee, (ii) per check charges, (iii) per deposit charges, (iv) a fee in lieu of a minimum balance, (v) federal deposit insurance fees, and (vi) automated transfer (Sweep) fees. All service charges other than allowable reasonable service charges assessed against an IOLTA Account are the responsibility of and shall be paid by the lawyer or law firm. No service charges in excess of the interest earned on the Account for any month or quarter shall be deducted from interest earned on other IOLTA Accounts or from the principal of the Account.

.1316-1 Comparability Requirements for IOLTA Accounts

This rule shall take effect on July 1, 2010.

(a) Comparability of Interest Rate. Eligible Banks that offer and maintain IOLTA Accounts must pay to an IOLTA Account the highest interest rate generally available from the bank to non-IOLTA Accounts (Comparable Rate) when the IOLTA Account meets or exceeds the same minimum balance or other account eligibility qualifications, if any. In determining the highest interest rate generally available from the bank to non-IOLTA accounts, eligible banks may consider factors, in addition to the IOLTA account balance, customarily considered by the bank when setting interest rates for its customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts.

(b) Options for Satisfying Requirement. An Eligible Bank may satisfy the Comparable Rate requirement by electing one of the following options:

- (1) use an account product that has a Comparable Rate;
- (2) without actually changing the IOLTA Account to the bank's Comparable Rate product, pay the Comparable Rate on the IOLTA Account; or
- (3) pay the benchmark rate (Benchmark), which shall be determined by NC IOLTA periodically, but not more frequently than every six months, to reflect the overall Comparable Rate for the NC IOLTA program. The Benchmark shall be a rate equal to the greater of: (i) 0.65% or (ii) 65% of the Federal Funds Target Rate as of the first business day of the IOLTA

remitting period, and shall be net of allowable reasonable service charges. When applicable, NC IOLTA will express the Benchmark in relation to the Federal Funds Target Rate.

(c) Options for Account Types. An IOLTA Account may be established as:

- (1) subject to paragraph (d), a business checking account with an automated investment feature (Sweep Account), such as an overnight investment in financial institution daily repurchase agreements or money market funds invested solely in or fully collateralized by US government securities, which are US Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof;
- (2) a checking account paying preferred interest rates, such as market based or indexed rates;
- (3) a public funds interest-bearing checking account, such as accounts used for governmental agencies and other non-profit organizations;
- (4) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or
- (5) any other suitable interest-bearing deposit account offered by the bank to its non-IOLTA customers.

(d) Financial Requirements for Sweep Accounts. If a bank establishes an IOLTA Account as described in paragraph (c)(1), the following requirements must be satisfied: an overnight investment in a financial institution daily repurchase agreement shall be fully collateralized by United States government securities, as described in this Rule, and may be established only with an Eligible Bank that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in United States government securities or repurchase agreements fully collateralized by United States government securities, as described in this Rule, and, at the time of the investment, shall have

total assets of at least two hundred fifty million dollars (\$250,000,000.00).

(e) Interest Calculation. Interest shall be calculated in accordance with an Eligible Bank's standard practice for comparable non-IOLTA Accounts.

(f) Higher Rates and Waiver of Service Charges Allowed. Nothing in this rule shall preclude a participating bank from paying a higher interest rate than described above or electing to waive any service charges on IOLTA Accounts.

.1319 Noncompliance

Every lawyer must comply with all of the administrative requirements of this rule, including the certification required in Rule .1318 of this subchapter. A lawyer's failure to comply with the mandatory provisions of this subchapter shall be reported to the Administrative Committee which may initiate proceedings to suspend administratively the lawyer's active membership status and eligibility to practice law pursuant to Rule .0903 of this subchapter.

Proposed Amendments to the CLE Rules

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

Upon the recommendation of the Program Evaluation Committee, it is proposed that the CLE rules be amended to include a requirement that all newly admitted lawyers be required to complete a 12-hour course of instruction on "professionalism, professional responsibility, and law office management to be known as the North Carolina State Bar New Admittee Professionalism Program.

Upon the recommendation of the Board of Continuing Legal Education, an amendment is proposed that will prohibit a disbarred lawyer from teaching an approved CLE course within five years of the effective date of the disbarment.

.1518 Continuing Legal Education Program

(a) Annual Requirement. Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder. ~~(b)~~ Of the 12 hours:

- (1) at least 2 hours shall be devoted to the

areas of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education instruction on substance abuse and debilitating mental conditions as defined in Rule .1602 ~~(e)-(a)~~. This hour shall be credited to the annual 12-hour requirement set forth in Rule .1518 (a) above but shall be in addition to the annual professional responsibility/professionalism requirement of Rule .1518 (b)(1) above. To satisfy ~~this the~~ requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

~~(e)~~ (b) Carryover. Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b) paragraph (a)(1) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year any approved CLE hours earned after that member's graduation from law school.

(c) Professionalism Requirement for New Members. Except as provided in paragraph (d)(1), all active members admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar New Admittee Professionalism Program (New Admittee Program) in the year the member is first required to meet the continuing legal education requirements as set forth in Rule .1526(b) and (c) of this subchapter. CLE credit for the New Admittee Program shall be applied to the annual mandatory continuing legal education requirements set forth in paragraph (a) above.

(1) Content and Accreditation. The State Bar New Admittee Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a New Admittee Program CLE activity, a sponsor must satisfy the annual content requirements. At least 45 days prior to the presentation of a New Admittee Program, a sponsor must submit a detailed description of the program to the

Genesis of the CLE Requirement for Newly Admitted Lawyers

John McMillan, at the start of his term as president of the North Carolina State Bar in November 2008, appointed the Program Evaluation Committee and directed it to review current State Bar programs and to consider the need for any new initiatives.

One of its subcommittees considered whether newly admitted lawyers needed assistance in the transition from law student to practicing lawyer and, if so, what programs or policies the State Bar could adopt to give this assistance. In determining a new lawyer's preparation for practice, the subcommittee considered law school training in ethics/professionalism and law office management, practice settings of North Carolina attorneys, and availability of mentoring programs.

Because an increasing number of newly admitted attorneys attend out-of-state law schools, the subcommittee surveyed both North Carolina law schools as well as ABA accredited law schools throughout the country to determine the availability of courses in ethics and professionalism and law office management. The survey revealed that most law schools do not offer any law office management courses. All law schools require a two or three credit course in ethics/professionalism with a minority of law schools offering advanced elective courses in ethics and professionalism. Some law schools integrate the teaching of ethics and professionalism with substantive law in some of the clinical programs offered to law students. The most surprising statistic is that 91% of the law schools have no established course content for the one required course on ethics and professionalism and course content is at the discretion of individual professors.

An Elon Law School census revealed that approximately 54% of lawyers in North Carolina are solo practitioners and another 20% practice in firms of two to six lawyers.

North Carolina does not have a mandatory mentoring program. However, there are several voluntary mentoring programs sponsored by district bars, county bars, and other bar organizations. These programs are usually found in large cities and are not available to new lawyers in less densely populated areas of the state.

Because of the limited courses offered by law schools in ethics and professionalism and law office management, because almost three-fourths of North Carolina lawyers are solo practitioners or in firms of six or less lawyers, and because mentoring programs are not widely available to new lawyers, the subcommittee recommended, and the council at its October meeting adopted for publication, an amendment to CLE Rule .1518 (see pages 62-64) that adds a professionalism/law office management course requirement for newly admitted attorneys. The rule amendment provides that all attorneys admitted after January 1, 2011, complete the 12 hour North Carolina State Bar New Admittee Professional Program. The rule amendment requires that the New Admittee Program consist of subjects in professional responsibility, professionalism, and law office management. The chairs of the Grievance and Ethics Committees of the State Bar will designate the specific subjects to be included each year. The rule amendment does not increase the number of CLE hours required of new lawyers, nor does it change the time period in which the hours are required to be completed. In addition, the rule does not change any deferments or exemptions currently in effect.

It is the hope of the committee that the New Admittee Program will give lawyers basic information in ethics, professionalism, and law office management that will enable them to better serve their clients and the public. ■

board for approval. Accredited sponsors shall not be exempt from the prior submission requirement and may not advertise a New Admittee Program until approved by the board. New Admittee Programs shall be spe-

cially designated by the board and no course that is not so designated shall satisfy the New Admittee Program requirement for new members.

(2) Evaluation. To receive CLE credit for

attending a New Admittee Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar when reporting attendance pursuant to Rule .1601(e)(1) of this subchapter.

(3) Format and Partial Credit. The New Admittee Program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is granted by the board. No part of the program may be taken on-line (via the Internet).

(d) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the New Admittee Program requirement and must notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the State Bar is exempt from the New Admittee Program requirement but, upon the entry of an order transferring the member back to active status, must complete the New Admittee Program in the year that the member is subject to the requirements set forth in paragraph (a) above unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(3) Exemptions Under Rule .1517. A newly admitted active member who qualifies for an exemption under Rule .1517 of this subchapter shall be exempt from the New Admittee Program requirement during the period of the Rule .1517 exemption. The member shall notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter. The member must complete the New Admittee Program in the year the member no longer qualifies for the Rule .1517 exemption or the next calendar year unless the member qualifies for the exemption

under paragraph (d)(1) of this rule.

.1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

(a) . . .

(d) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience. Credit shall not be given for any continuing legal education activity taught or presented by a disbarred lawyer except a course on professional responsibility (including a course or program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities) taught by a disbarred lawyer whose disbarment date is at least five years (60 months) prior to the date of the activity. The advertising for the activity shall disclose the lawyer's disbarment.

Proposed Amendments to the Plan of Legal Specialization

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization; Section .2900, Certification Standards for the Elder Law Specialty

The proposed amendments to the hearing and appeal rules of the specialization program improve the clarity of the rules, streamline the appeal process, and make hearings less adversarial.

The proposed amendments to the standards for the elder law specialty make the experience requirements for certification the same as those required by the National Elder Law Foundation, the testing organization for the elder law specialty.

.1801 Incomplete Applications: Reconsideration of Applications, Failure of Written Examinations Rejected by Specialty Committee, and Appeals Reconsideration Procedure

(a) ~~Applications Incomplete and/or Applicants Not in Compliance with Standards for Certification~~

(1) Incomplete Applications. The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. The applicant will be notified in writing of the incompleteness of his or her application if an application is incomplete. The applicant must submit ~~the the~~ informa-

~~tion necessary to completed complete the application within 21 days of the date of mailing of the notice.~~ If the applicant fails to provide the required information for the application during the requisite time period, the executive director will refer the application to the specialty committee for review. return the application to the applicant together with a refund of the application fee less a fifty dollar (\$50.00) administrative fee. The decision of the executive director to reject an application as incomplete is final unless the applicant shows good cause for an extension of time to provide the required information.

(b) (2) Applicant Not in Compliance Denial of Application by Specialty Committee. The executive director shall refer all complete applications to the specialty committee for review ~~any application which appears complete on its face, but which does not satisfactorily demonstrate for~~ compliance with the standards for certification in the specialty area for which certification is sought.

(3) Specialty Committee Action—The specialty committee shall review the incomplete applications and the applications not in compliance with the standards for certification. After reviewing the applications, the specialty committee shall recommend to the board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative recommendation must be specified. ~~The specialty committee must complete the above process within 14 days of receiving the applications.~~

(14) Notification to Applicant of the Specialty Committee's Action. The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application and the board's intention to act in accordance with the committee's recommendation. The notification must specify the reason for the recommendation of rejection of the application: ~~In addition, the notification and shall inform the applicant of his or her the right to petition pursuant to paragraph (c) of this rule the board for review of the application or request a hearing before the board.~~ reconsideration of the recommendation of the specialty committee.

(c5) Petition for Review by the Board Reconsideration. Within ~~21~~ 14 days of the mailing date of the notice from the executive director that an application has been recommended for rejection by ~~the a~~ specialty com-

mittee, the applicant may petition the board for review reconsideration. The petition may be informal (e.g., by letter), but shall be in writing and should shall include the following information: date on which notice of the recommendation of rejection was received the applicant's election between a reconsideration hearing on the written record or in-person and the reasons for which the applicant believes the specialty committee's recommendation of rejection should not be accepted.

(d6) Review of Petition by the Board Reconsideration Procedure. Upon receipt of a petition filed pursuant to paragraph (c) of this rule, a three-member panel of the board, to be appointed by the chairperson of the board, shall review and reconsider an application pursuant to the following procedures: take action by a majority of the panel upon the petition and notify the applicant of the board's decision. The notification shall inform the applicant of his or her right to appeal the decision to the North Carolina State Bar Council (the council) if the board's action is unfavorable to the applicant.

(7) Request for Hearing. In lieu of a petition for review, an applicant may request a hearing before the board. The applicant shall notify the board through its executive director in writing of such request for a hearing within 21 days of the mailing of the notice regarding the specialty committee's recommendation of rejection of the application. The applicant shall set forth the grounds for the hearing before the board. In such a request, the applicant shall list the names of prospective witnesses and identify documentation and other evidence to be introduced at the hearing before the board. The applicant shall be notified of the board's decision, and if the board's decision is unfavorable to the applicant, the applicant will be notified of his or her right to appeal the board's decision to the council.

(8) Hearing Procedures

(1) (A) Notice. Time and Place of Hearing The chairperson of the board panel shall fix set the time and place of the hearing to reconsider the applicant's application as soon as practicable after the applicant's request for hearing reconsideration is received. The applicant shall be notified of the hearing date. Such notice shall be given to the applicant at least 10 days prior to the time fixed set for the hearing.

(B) Quorum A panel of three members of the board, as appointed by the chairperson, shall be necessary to conduct the hearing with

the majority of those in attendance necessary to decide upon the matter.

(2) Reconsideration on the Written Record. (C) Representation by Counsel and Witnesses If the The applicant may elects to have the matter decided on the written record, the applicant will not be present at the hearing and no witnesses will appear before the panel except the executive director of the specialization program, or a staff designee, who shall provide administrative support to the panel. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant would like to be considered by the panel.

(3) Reconsideration In-Person. If the applicant elects to be present at the hearing, the applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may cross-examine question any witness. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant wants considered by the panel and, if the reconsideration is in-person, with the names of prospective witnesses. At least ten days prior to the hearing, the applicant shall be provided with copies of any documents that the executive director will submit to the panel, except confidential peer review forms or information, and with the names of prospective witnesses. Additional documents may be considered at the discretion of the panel.

(D) Written Briefs The applicant is urged to submit a written brief (in quadruplicate) 10 days prior to the hearing to the executive director for distribution to the panel in support of his or her position. However, written briefs are not required.

(E) Depositions Should the applicant or executive director desire to take a deposition prior to the board hearing of any voluntary witness who cannot attend the board hearing, such intention to take, and request to take, the deposition of a witness may be applied for in writing to the chairperson of the board together with a written consent signed by the potential witness that he or she will give a deposition for one party and a statement to the effect that the witness cannot attend the hearing along with the reason for such unavailability. The party seeking to take the deposition of a witness shall state in

detail as to what the witness is expected to testify. If the chairperson is satisfied that such deposition from a possible witness will be relevant to the issue in question before the board, then the chairperson will authorize said taking of the deposition. The chairperson will also designate the executive director or a member of the specialty committee to be present at the deposition. The deposition may be taken orally or by video. Any refusal of the taking of the deposition by the chairperson shall be reviewed by the board at the request of the applicant. The cost connected with taking the deposition shall be borne by the party requesting the deposition.

(F) Continuances Motions for continuance of the hearing should be made to the chairperson of the board and such motions will be granted or denied by the chairperson of the board.

(4G) Burden of Proof. Preponderance of the Evidence The applicant must make a clear and convincing showing that the application satisfies the standards for certification in the applicable specialty. The panel of the board shall apply the preponderance of the evidence rule in determining whether or not to accept the application for certification. The burden of proof is upon the applicant.

(5) (H) Conduct of Hearings: Rights of Parties— Reconsideration Hearing.

(Ai) Preservation of Record. Hearings The hearing shall be recorded unless the applicant agrees in writing that the hearing shall not be recorded or, if the applicant wants an official transcript, the applicant reported by a certified court reporter's. The applicant shall pay pays the costs associated with obtaining the a court reporter and makes all arrangements for the court reporter's services and for the preparation of the transcript, services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the board before whom the hearing is conducted. The board in its discretion may refund to the applicant all or some portion of the necessary costs incurred as a result of the hearing.

(ii) The applicant may retain counsel at all stages of the investigation and at all meeting hearings. The applicant and his or her counsel

shall have the right to attend all hearings.

(Biii) Procedural Rules. Oral evidence at hearings shall be taken only on oath or affirmation. The applicant shall have the right to testify unless he or she specifically waives such right or fails to appear at the hearing. If the applicant does not testify on his or her behalf, the applicant may be called and examined by the panel of the board, the executive director, and any member of the specialty committee. The applicant's failure to appear at the hearing ordered by the board, after receipt of written notice, shall constitute a waiver of the applicant's right to a hearing before the board.

(iv) At any hearing, the panel of the board, the executive director, any member of the appropriate specialty committee, and the applicant shall have these rights:

(a) to call and examine witnesses;

(b) to offer exhibits;

(c) to cross examine witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; and

(d) to impeach any witness regardless of who first called such witness to testify and to rebut any evidence.

(v) Hearings The reconsideration hearing shall need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted and may be considered by the panel according to its probative value if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(C) Decision of the Panel. (vi) Any hearing may be recessed or adjourned from time to time at the discretion of the panel.

The decision of the panel shall be by a majority of the members of the panel and shall be binding upon the board. Written notification of the decision shall be sent to the applicant. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and shall notify the applicant of the right to appeal the decision to the North Carolina State Bar Council (the council) pursuant to Rule .1804 of this subchapter.

(e 9) Failure of Applicant to Petition the Board for Review or Request a Hearing Before the Board Reconsideration Within

the Time Allowed by These Rules. If the applicant does not petition the board for review or request a hearing before the board regarding reconsideration of the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

(b) Failure of a Written Examination Prepared and Administered by a Certification Committee

(1) Review of Examination Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not remove the examination from the board's office.

(2) Petition for Grade Review If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim.

(3) Review Procedure The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying information on the examination or the petition. The review committee of the specialty committee shall review the petition of the applicant and determine whether the grade of the examination should remain the same or be changed. The review committee shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.

(4) Decision of the Board The board shall consider the petition and the report and recommendation of the review committee and shall certify the applicant if it determines that the applicant has satisfied all of the standards for certification.

(c) Failure of a Written Examination Prepared and Administered by a Testing Organization on Behalf of the Board.

The applicant shall comply with the review and appeal procedures of any testing organization retained by the board to prepare and administer the certification examination.

.1802 Denial, Revocation, or Suspension of Continued Certification as a Specialist

(a) . . .

(c) Notification of Board Action. The executive director shall notify the lawyer of the board's action to grant or deny continued certification as a specialist upon application for continued certification pursuant to Rule .1721(a) of this subchapter, or to revoke or suspend continued certification pursuant to Rule .1723(a) or (b) of this subchapter. If the board's action is unfavorable, the notification shall set forth the grounds for the action and shall notify The the lawyer will also be notified of his or her of the right to a hearing if a hearing is allowed by these rules.

(d) Request for Hearing. Within 21 14 days of the mailing date of the of notice from the executive director of the board that the lawyer has been denied continued certification pursuant to Rule .1721(a) of this subchapter or that certification has been revoked or suspended pursuant to Rule .1723(b) of this subchapter, the lawyer must request a hearing before the board in writing. There is no right to a hearing upon automatic revocation pursuant to Rule .1723(a).

(e) Hearing Procedure. Except as set forth in Rule .1802(f) below, the procedures rules set forth in Rule .1801(ad)(8) of this subchapter shall be followed when a lawyer requests a hearing regarding the denial of continued certification pursuant to Rule .1721(a) of this subchapter or the revocation or suspension of certification under Rule .1723(b) of this subchapter.

(f) Burden of Proof. Preponderance of the Evidence. A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the lawyer's certification should be continued, revoked, or suspended. In cases of denial of an application for continued certification under Rule .1721(a), the The burden of proof is upon the lawyer. In cases of revocation or suspension under Rule .1723(b), the burden of proof is upon the board.

(g) Notification of Board's Decision. After the hearing, the board shall timely notify the

lawyer of its decision regarding continued certification as a specialist. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and the lawyer's appeal rights under Rule .1804 of this subsection.

~~.1803 RESERVED~~ Reconsideration of Failed Examination

(a) Review of Examination. Within 30 days of the date of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not copy, transcribe, or remove the examination from the board's office (or any other location established by the board for the review of the examination) and shall be subject to such other restrictions as the board deems necessary to protect the content of the examination.

(b) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within 45 days of the date of the notice of failure and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim.

(c) Review Procedure. The applicant's examination and petition shall be submitted to a panel consisting of three members of the specialty committee (the grade review panel). All identifying information shall be redacted from the examination and petition prior to submission to the grade review panel. The grade review panel shall review the petition of the applicant and determine whether the grade of the examination should be changed. The grade review panel shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.

(d) Decision of the Board. The board shall consider the petition and the report of the grade review panel and shall certify the

applicant if it determines by majority vote that the applicant has satisfied all of the standards for certification.

(e) Failure of Examination Prepared and Administered by a Testing Organization on Behalf of the Board. Notwithstanding paragraphs (a) – (d) of this rule, if the board is utilizing a qualified organization to prepare and administer the certification examination for a specialty pursuant to Rule .1716(10) of this subchapter, an applicant for such specialty shall only be entitled to the review and appeal procedures of the organization.

.1804 Appeal to the Council

(a) Appealable Decisions. An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is incomplete and/or it is not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. The rejection of an application because it is incomplete shall not be appealable. (Persons who appeal the board's decision are referred to herein as appellants.)

(b) Filing the Appeal. An appeal from a decision of the board as described in paragraph Rule .1804 (a) may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the mailing date of the notice of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) Time and Place of Hearing. The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.

(d) Record on Appeal to the Council.

(1) The record on appeal to the council shall consist of all the evidence documents and oral statements by witnesses offered at the hearing before the board any reconsideration hearing. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.

(2) If a court reporter was present at a reconsideration hearing at the election of

the appellant, the appellant shall make prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.

(e) Parties Appearing Before the Council. The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.

(f) Appeal Procedure. The council shall consider the appeal *en banc*. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the ~~meeting~~ hearing may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.

(g) Scope of Review. Review by the council shall be limited to whether the appellant was provided with procedural rights and whether the board, or the reconsideration panel where applicable, applied the correct procedural standards and State Bar rules in rendering its decision. The appellant shall have the burden of making a clear and convincing showing of arbitrary, capricious, or fraudulent denial of procedural rights or misapplication of the procedural standards or State Bar rules.

(h) Notice of the Council's Decision. The appellant shall receive written notice of the council's decision.

.1806 Additional Rules Pertaining to Hearing and Appeals

(a) Notices. Every notice required by these rules shall be deemed sufficient if mailed sent to the applicant at the address listed on the applicant's last application to the board or the address in the official membership records of the State Bar.

(b) Expenses Related to Hearings and Appeals. In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her attorney, and witnesses called by the applicant shall be

home paid by the applicant and shall not be paid by the board.

.2905, Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice.

....

(c) Substantial Involvement Experience Requirements...

(1)

(3) Experience Categories:

(A)

(F) Special Needs Counseling, including the planning, drafting, and administration of special/supplemental needs trusts, housing, employment, education, and related issues.

[Reletter subparagraphs (F) to (I)]

~~(J) income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.~~

~~(K) public Benefits Advice, including plan-~~

~~ning for and assisting in obtaining Medicare, social security, and food stamps.~~

[Reletter remaining subparagraphs]

Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 8.3, Reporting Professional Misconduct

At the request of the North Carolina Dispute Resolution Commission, the Ethics Committee proposes an amendment to Rule 8.3 that will exempt a lawyer serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators from reporting information learned during a mediation relative to another lawyer's misconduct.

Rule 8.3, Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a

substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b)

(c) This Rule does not require disclosure of information learned during a mediation by a lawyer who is serving as a certified mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators unless disclosure is allowed by such standards.

Comment

[1]

[7] The North Carolina Supreme Court has adopted Standards of Professional Conduct for Mediators to regulate the conduct of all certified mediators. Mediators governed by those standards are required to keep confidential the statements and conduct of the parties and other participants in the mediation, with limited exceptions, to encourage the candor that is critical to the successful resolution of legal disputes. ■

IOLTA (cont.)

on September 1, 2009. The council appointed: Michael A. Colombo, former NCBA President, who is in private practice in Greenville; F. Edward Broadwell Jr., chairman and CEO of Home Trust Bank in Asheville and former chair of the NC Bankers Association; and Irvin W. (Hank) Hankins III, immediate past-president of the NC State Bar who is in private practice in Charlotte. Three trustees completed their service in 2009: Marion Cowell of Charlotte; Robert Baker of Durham, and Michael Miller of Asheville. Larry S. McDevitt of Asheville was appointed chair of the NC IOLTA Board and Robert A. Wicker was appointed vice-chair for 2009-10.

Celebrating our History

NC IOLTA celebrated its 25th anniversary in 2009. To honor the occasion, the NC State Bar *Journal* published a three-part series of articles on NC IOLTA. The first article (in the spring issue of the *Journal*) focused on the program's establishment and its exceptional leadership throughout its history. The second article discussed the ups and downs of IOLTA income over the years, and the final article

highlighted the program's grant-making. The entire series of articles can be accessed on the State Bar's website at: www.ncbar.com/IOLTA_articles.pdf.

Considering Comparability

Over the last several years, many IOLTA programs (27 at last count) have increased IOLTA income significantly by implementing "comparability" which requires lawyers to maintain their IOLTA accounts only at banks that pay rates on those accounts which are comparable to what the banks pay on other, similar accounts. State Bar President John McMillan made exploring a comparability requirement for NC IOLTA a goal of his presidency, and the concept is supported by NCBA leaders and the NC Equal Access to Justice Commission.

Having seen other states increase IOLTA income through comparability, the NC IOLTA trustees felt it was their duty to explore whether such a requirement would increase IOLTA income in North Carolina—particularly since a majority of NC IOLTA accounts are held at multi-state banks that are already operating in comparability jurisdictions. NC IOLTA Trustees engaged a consultant whose analysis of the program determined that,

under comparability, significant increases could be projected for the future and recommended that North Carolina immediately begin the process of moving to comparability so it will be in place when the rate climate improves. This report was presented to the IOLTA trustees and the NC State Bar during the April State Bar meeting.

Since April, IOLTA and State Bar staff and leadership have worked to draft a proposed IOLTA rule revision that would include comparability requirements to be presented to the NC State Bar at its October 2009 meeting. They have also established a dialogue with the NC Bankers Association and continue to provide information to it and solicit its input regarding comparability. Further, efforts are continuing to educate the bar about the concept. At their September board meeting, the IOLTA Trustees recommended that the NC State Bar adopt a comparability requirement and approved and forwarded to the State Bar a proposed revision to IOLTA rules that could be used to implement such a requirement. The NC State Bar Council approved this rule for publication for public comment at its meeting on October 23. For more information on comparability, visit the NC State Bar website: www.ncbar.gov. ■

Grievance Committee and DHC Actions

Disbarments

Wilmington lawyer **Roddey M. Brown III** surrendered his law license to the State Bar Council and was disbarred. Brown admitted that he misappropriated entrusted funds totaling at least \$21,282.16.

Christine C. Gates of Charlotte surrendered her law license to the Wake County Superior Court and was disbarred. Gates pled guilty in federal court to felony mail, wire and/or bank fraud, conspiracy, and money laundering.

Joseph L. Smalls Jr. of Columbia, South Carolina, was disbarred pursuant to an Order of Reciprocal Discipline entered by the chair of the Grievance Committee. The order reciprocated the South Carolina Supreme Court's Order of Disbarment which found that Respondent failed to maintain the records and integrity of his trust accounts, mishandled client funds, and ignored financial recordkeeping requirements.

Warrenton lawyer **Michael A. Williams** surrendered his law license to the Wake County Superior Court and was disbarred. Williams admitted that he misappropriated entrusted funds totaling at least \$16,350.00.

Suspensions & Stayed Suspensions

The DHC suspended Wilson lawyer **Mark L. Bibbs** for one year. Bibbs appeared in the courthouse intoxicated and was loudly belligerent to courthouse personnel. The suspension is stayed for three years upon compliance with numerous conditions.

Tolly A. Kennon III of Charlotte was suspended for three years. Kennon improperly advised unrepresented people who were potential witnesses against his clients in two criminal cases. The interests of the witnesses were potentially in conflict with those of Kennon's clients. His advice, if followed, could have obstructed the opposing party's access to evidence.

Disability Inactive Status

Judith Bullock of Cary was transferred to disability inactive status by consent order of

the Grievance Committee. Bullock suffers from depression.

Brett Hubbard of Cary was transferred to disability inactive status by consent order of the Grievance Committee. Hubbard suffers from depression.

The DHC transferred Morehead City lawyer **Grey Holland McCormick** to disability inactive status. McCormick was convicted of the felony of manufacturing, selling, delivering, or possessing a controlled substance with intent to manufacture, sell, or deliver and of the misdemeanor of maintaining a place for use, keeping, or sale of a controlled substance. The trial court suspended McCormick for one year in her criminal case. McCormick's disciplinary action is stayed until she is restored to active status.

Censures

Raleigh lawyer **Lori M. Glenn** was censured by the Grievance Committee. In a real estate closing, Glenn failed to inform her client, the buyer, that a deed of trust remained on the property after closing, depriving her client of necessary information to make an informed decision about the transaction. Glenn did not comply with her client's request for copies of the deed and HUD-1 Settlement Statement. The client's title insurance policy was cancelled when Glenn failed to submit a final title opinion and failed to pay the premium for more than a year after closing. Glenn held the title insurance premium in her trust account for over a year and failed to provide her client a written accounting of the funds.

Reprimands

Ernest C. Carter Jr. of Ahoskie was reprimanded by the Grievance Committee. Carter undertook to represent his clients in a dispute with their homebuilder but then failed to take any action on their behalf. He did not communicate with his clients for almost four years. Carter also failed to reconcile his trust account quarterly and failed properly to account for entrusted funds.

Leon Cox of Jacksonville was reprimand-

ed by the Grievance Committee. Cox drafted a real estate purchase contract for a client but failed to properly hold the deed for the property in trust and failed to promptly deliver the deed when the client requested it.

Charlotte lawyer **Naadei Dzani** was reprimanded by the Grievance Committee. Dzani improperly split a fee with a lawyer in another firm, agreed to handle an adoption case she was not competent to handle, failed to represent her client diligently, failed to promptly withdraw from the case when the representation ended, and failed to communicate with her client.

Maxton lawyer **Chad Hammonds** was reprimanded by the Grievance Committee. Hammonds represented four clients in a personal injury case arising from a car accident. He failed to notify any of his clients that he had conflicts of interest. He filed two civil cases. In one civil case, Hammonds named two of his clients as defendants. Despite his conflict of interest, which required him to withdraw from representing any of the clients, Hammonds withdrew from representing only two of the clients and continued to represent the remaining two.

Kimberly J. Jordan of Raleigh was reprimanded by the Grievance Committee. Jordan neglected her client's domestic case, failed to appear at a scheduled meeting with her client, failed to communicate with her client, failed to respond to the State Bar's request for additional information and failed to comply with the State Bar's subpoena.

Charlotte lawyer **Nikita Mackey** was reprimanded by the Grievance Committee. Mackey listed his marital status as "single" on a bankruptcy petition when he was in fact married. He was found in criminal contempt of court for failing to appear at his criminal client's trial. He failed to comply with the State Bar's subpoenas for production of state tax records.

Admonitions by DHC

Wilson lawyer **Michael Anderson** filed an

CONTINUED ON PAGE 77

Law School Briefs

All of the law schools located in North Carolina are invited to provide material for this column. Below are the submissions we received this quarter.

Campbell University School of Law

Campbell Law starts classes in Raleigh—History was made at 8:15 am on September 14, 2009: the first official classes began at the new home of the Norman Adrian Wiggins School of Law in downtown Raleigh.

Located just two blocks from the State Capitol, state and federal courts, and the heart of the region's legal community, Campbell Law School recently completed its move to downtown Raleigh. North Carolina's flagship city was previously the largest state capital without a law school, and Campbell Law's new location features 13 state-of-the-art classrooms, a spacious legal writing center, clinical space, three courtrooms, and other amenities. A total of 409 students are enrolled at Campbell Law School for the 2009-2010 academic year.

Campbell Law School is also the new home of the Raleigh Division of the North Carolina Business Court, a specialized court that handles complex business litigation, making it one of only a handful of the nation's law schools to house a working court. The Business Court opened in the Campbell Law School building in October 2009.

"We are so pleased to occupy a world-class facility in the middle of a world-class city," said Dean Melissa Essary. "We are bringing our tradition of excellence to Raleigh where Campbell Law will be part of the landscape for generations to come. Our students will have opportunities and experiences inside and outside of the classroom that we could not have provided anywhere else."

The new contact information for Campbell Law School is:

Campbell University
Norman Adrian Wiggins School of Law
225 Hillsborough Street, Suite 401
Raleigh, NC 27603
Phone: 919-865-5878
law.campbell.edu

Charlotte School of Law

This semester CharlotteLaw welcomed 249 new students. Of the incoming student body, 39 of the students are enrolled in CharlotteLaw's part-time evening program, which is one of only two part-time evening programs in the state. Currently in its 4th year, Charlotte School of Law now has 481 students.

The *Charlotte Law Review* published its first journal based on the 2008 Symposium: Ethics in the Legal Profession.

An international programs initiative was established to explore faculty and student exchanges with Africa, China, and Europe. To date, visits have been made to Tanzania and South Africa. Additional visits are planned for those two countries as well as China and countries in Europe.

Helping out in the community—As of May 2009, CharlotteLaw students had completed over 20,000 hours of *pro bono* work in over 164 community sites. Students are required to complete 30 hours of *pro bono* and community service work prior to graduation, although some students complete as many as 250 hours over a three-year period.

CharlotteLaw's SelfServe Center Group Project was chosen as the recipient of The North Carolina Bar Association's Law Students Pro Bono Project Award by the NCBA Foundation's Public Service Advisory Committee.

CharlotteLaw students also helped to plan and participated with local legal professionals in Service Juris Day on August 29.

Graduation—Sixty-one students received Juris Doctor (JD) degrees during the school's inaugural graduation held at Ovens Auditorium on May 17, 2009. The keynote speaker was Honorable Allyson Duncan, US Fourth Circuit Court of Appeals.

Duke Law School

Several top scholars have joined the Duke Law faculty with the start of the new academic year.

■ International law expert Laurence Helfer holds the Harry R. Chadwick Jr. chair and

serves as co-director of the Duke Center for International and Comparative Law.

■ Guy-Uriel Charles, a scholar of constitutional law, election law, and race and the law, among other areas, is the founding director of the Duke Center on Law, Race, and Politics.

■ Kimberly Krawiec, an expert in corporate, securities, and derivatives law, focuses her research on the empirical analysis of contract disputes, forbidden or taboo markets, corporate compliance systems, derivatives hedging practices, and "rogue" trading, among other areas.

■ Joseph Blocher is an emerging scholar in the areas of constitutional law, the First and Second Amendments, capital punishment, property, federal courts, and law and development.

Among a number of distinguished scholars visiting Duke Law in the 2009-2010 academic year is Associate Justice Samuel Alito of the United States Supreme Court, who taught Current Issues in Constitutional Interpretation in September.

Complimented by the addition of a number of distinguished professors of the practice to the faculty—including Donald Beskind, a noted member of the North Carolina litigation bar—Dean David F. Levi has undertaken a number of curricular initiatives that integrate practical skill development into the upper-year curriculum. Notable among these are the expansion of the Duke in DC program and launch of the Federal Defender Integrated Domestic Externship program under the direction of James Coleman, Duke's Bradway Professor of the Practice of Law. Eight students are working at the Federal Public Defender's Office for the Eastern District of North Carolina for 16 hours each week, mentored and supervised by two attorneys in the FPDO who also serve as adjunct instructors in the classroom component of the program.

In its second semester, the Duke in DC externship program is focusing on financial regulatory reform; nine Duke Law students, along with one student from Duke's Nicholas School for the Environment and two from the University of North Carolina School of Law,

are working full-time in congressional offices and regulatory and policy-making agencies in Washington, DC, as well as taking classes taught by James Cox, Brainerd Currie Professor of Law and a noted expert in corporate and securities law, and visiting professor of the practice Lawrence Baxter, who has rejoined the Duke faculty after more than a decade working in the financial sector.

Elon University School of Law

Elon Law representative added to NC General Statutes Commission—As a result of legislation signed into law by Governor Purdue in August, Elon Law now has a representative on the NC General Statutes Commission. The commission advises the General Assembly on the adoption and amendment of uniform state laws. Dean George R. Johnson Jr. has appointed Assistant Professor Andrew Haile as Elon's first representative to the commission.

New faculty members join Elon Law—Sonya Garza and David Levine will serve as assistant professors of law, specializing in family law and intellectual property law respectively, and Roland Smith, a faculty member at the Center for Creative Leadership (CCL), will serve as a visiting professor of leadership.

Garza previously taught at New England and Texas Tech Schools of Law. She practiced with Fulbright & Jaworski, LLP, in Houston and with Akin Gump, LLP, in Washington, DC. She received a bachelor's degree from University of Texas-Austin and law degree from Stanford Law School where she was note editor of the *Stanford Law Review*.

Levine is a fellow at the Center for Internet and Society at Stanford Law School. His intellectual property law radio show, Hearsay Culture, was chosen one of the top five podcasts in the ABA's Blawg 100 of 2008. Levine practiced in the Manhattan offices of Pryor Cashman, LLP, and Windels Marx Lane & Mittendorf, LLP, and as assistant corporation counsel for the City of New York. He holds a bachelor's degree from Cornell University and law degree from Case Western Reserve Law School.

Smith leads the legal sector practice group at CCL. He published *The Changing Nature of Leadership in Law Firms* in 2009. He received his bachelor's and master's degrees from Boise State University and doctorate from the University of Idaho.

Visit law.elon.edu for more news from Elon Law School.

North Carolina Central University School of Law

Graduation—In May, NCCU School of Law graduated 180 students, the largest graduation class in the history of the law school.

Foreign summer program in Costa Rica—In May, a site evaluation accreditation team of the American Bar Association Section on Legal Education visited the NCCU School of Law Foreign Summer Program in San Jose, Costa Rica. Begun in 2007, this is the first foreign summer program offered by the law school. The program provides an engaging comparative and international curriculum.

Seventy year anniversary—In August, the law school held a three-day celebration to commemorate the 70th anniversary of NCCU School of Law. In 1939, the North Carolina General Assembly enacted House Bill 18, authorizing the establishment of a law school at North Carolina College for Negroes (now North Carolina Central University). During the days of segregation, the legislation was designed to create a legal education opportunity for Blacks who wanted to become attorneys. Seventy years later, NCCU School of Law has become one of the most racially diverse law schools in the nation within both the student body and faculty.

Academic affairs—In August, Wendy Scott joined NCCU School of Law as associate dean for academic affairs. Previously the vice-dean for academic affairs at Tulane University School of Law, Scott is a highly published and noted scholar of constitutional law with a particular expertise in fourteenth amendment issues. Scott received her undergraduate degree in Philosophy from Harvard University and her law degree from New York University School of Law.

National ranking—In September, *National Jurist Magazine* ranked NCCU School of Law as the number-one Best Value Law School in the nation. The ranking is based on bar passage rate, affordability, and job placement over the previous two years.

University of North Carolina School of Law

Finance and regulation research earns national attention—Debate over the future of financial markets has demanded innovative thinking about regulation, including words of caution offered by faculty members Saule Omarova and Adam Feibelman in the article

Risks, Rules, and Institutions: A Process for Reforming Financial Regulation, which appears in Volume 39 of the *University of Memphis Law Review*. The article received advanced mention in the July 5 edition of a regular column in the *Atlantic* magazine by Richard A. Posner.

US News & World Report ranking—UNC School of Law moved to No. 30 in the *US News and World Report's* 2010 edition of "America's Best Graduate Schools," rising eight notches since last year. In the category of reputation, lawyers and judges rank the school the 17th strongest in the nation while scholars rank it 20th.

School hosts Middle Temple Society—In September, the school hosted future British barristers for a friendly moot court competition. The visit was a part of the Middle Temple Society exchange program which enables UNC law students to compete against British law students. Last year, UNC students traveled to London for the competition.

Center for Civil Rights and pro bono program partner with Legal Aid of NC—Twenty students spent spring break drafting wills and powers of attorney for low-income residents in rural eastern North Carolina. The project was developed by Legal Aid of NC, the UNC Center for Civil Rights, and the UNC Pro Bono Program. The students served approximately 40 clients, and the pilot program has become a model for a similar project that will be offered this fall and next spring.

Students volunteer with NC State Home Foreclosure Prevention Project—Students are volunteering to conduct "red-flag reviews" of loan documents for the NC State Home Foreclosure Prevention project, which was recognized this summer by Gov. Beverly Perdue and the NC Office of the Commissioner of Banks for helping more than 1,000 North Carolina homeowners avoid foreclosure since the program's inception.

Wake Forest University School of Law

The *Wake Forest Law Review* held its second annual fall symposium on October 30 on the topic of "Labor and Environmental Protection in Free Trade Agreements: A New Paradigm?"

One of the most controversial issues in international trade has been its effect on labor rights and environmental protection. Since the North American Free Trade Agreement entered into force in 1994, a core tenet of US trade

CONTINUED ON PAGE 76

State Bar Swears in New Officers



Weyher



di Santi



Fox

Weyher Installed as President

Raleigh attorney Barbara B. (Bonnie) Weyher was installed as president of the North Carolina State Bar. She was sworn in by Chief Justice Sarah Parker of the North Carolina Supreme Court at the State Bar's Annual Dinner on Wednesday, October 21, 2009, and officially took office at the conclusion of the council meeting on October 23, 2009.

Ms. Weyher earned both her BA and JD degrees (with honors) from the University of North Carolina at Chapel Hill. She was admitted to the practice of law in 1977.

After beginning her career in a New York City law firm, she returned to North Carolina in 1979 to join the firm of Young, Moore, Henderson & Alvis, PA, in Raleigh. In 1983, she became one of the founding partners of Yates, McLamb & Weyher, LLP. Weyher is also a certified mediator and mediates cases on a regular basis.

Ms. Weyher has substantial involvement in local and state bar organizations. She served on the North Carolina State Bar Council from 1998 through 2006. She has chaired the Grievance Committee, Ethics Committee, Issues Committee, Facilities Committee, and the Authorized Practice of Law Committee. She has also served on the Executive Committee, and Publications Committee. Ms. Weyher has chaired (2005-2006) the Litigation Section of the North Carolina Bar Association. She is a past-president of the Wake County Bar Association. She is also a member of the American Bar Association, Defense Research Institute, North Carolina Association of Women Attorneys, North Carolina Academy of Superior Court Mediators, and North

Carolina Association of Defense Attorneys.

Ms. Weyher is married to her law partner Dan McLamb and they have four sons.

di Santi Elected President-Elect

Boone attorney

Anthony S. (Tony) di Santi was elected as president-elect of the North Carolina State Bar. He was sworn in at the State Bar's Annual Dinner on Wednesday, October 21, 2009.

Mr. di Santi served in the United States Army from 1966 through 1969. For his service in Viet Nam he was awarded the Silver Star and Purple Heart.

He earned a BS degree in Business Administration from the University of North Carolina at Chapel Hill and JD degree from the Wake Forest University School of Law. He was admitted to the practice of law in 1975 and currently practices with the Boone firm of di Santi Watson Capua & Wilson.

Mr. di Santi has substantial involvement in local and state bar organizations. He has served as president of the Watauga County Bar Association and is a member of the North Carolina Bar Association, and the American Bar Association. He has served on the North Carolina State Bar Council since 2001. Mr. di Santi chaired the Publications Committee, the Authorized Practice Committee, and the Issues Committee and was vice-chair of the Grievance Committee and Administrative Committee.

Mr. di Santi has been active in numerous civic organizations including Blowing Rock Rotary Club, Boone Kiwanis Club, Blowing Rock Community Foundation, Blowing Rock State Company, Blowing Rock Charity Horse Show Foundation, Blowing Rock Art and History Museum, and the Blowing Rock Chamber of Commerce, on which he served two terms as president. From 1984 through 1992 he served on the Blowing Rock Town Council.

Mr. di Santi is married to Deborah and they

have one daughter who is a graduate of UNC.

Fox Elected as Vice-President

Winston-Salem attorney James R. (Jim) Fox was elected as vice-president of the North Carolina State Bar in October at the State Bar's Annual Dinner.

Mr. Fox received his AB degree in History from Duke University in 1968, and his JD from Duke University School of Law in 1971, where he served on the Editorial Board of the *Duke Law Journal*. He was a partner in the firm of Howrey & Simon in Washington, DC, where he practiced from 1971 to 1984. In 1984 he returned to North Carolina and began to practice with the Winston-Salem firm of Bell, Davis & Pitt, where he was a partner until 2006. He remains of counsel to Bell, Davis & Pitt, and is currently serving as general counsel to Pike Electric, Inc., a publicly listed electric power construction and maintenance company located in Mount Airy. A litigator and trial lawyer, Mr. Fox is a fellow of the American College of Trial Lawyers, and an adjunct professor of Trial Practice and Pretrial Litigation at Elon University School of Law.

Mr. Fox has had substantial involvement in local and state bar organizations. He served as chair of the State Bar's Disciplinary Hearing Commission, as chair of the NCBA's Trial Practice Curriculum Committee, as a member on the Executive Committee of the Bar Association's Litigation Section, and as vice-president of the Forsyth County Bar Association. While on the State Bar Council, Fox has chaired the Grievance Committee, Statute of Limitations Study Committee, and Special Disciplinary Guidelines Committee, and was vice-chair of the Authorized Practice Committee. He has also served on the Special Committee on Real Property Closings, Emerging Issues Committee, Executive Committee, Program Evaluation Committee, and Disciplinary Review Committee.

Mr. Fox is also active in numerous civic organizations, as well as in Duke Alumni activities. He resides in Winston-Salem with his wife, Debbie. They have two daughters, Alexandra and Victoria, who are in college. ■

Resolution of Appreciation of John B. McMillan

WHEREAS, John B. McMillan was elected by his fellow lawyers from the 10th Judicial District in January 1998 to serve as their representative in this body. Thereafter, he was elected for three successive three-year terms as councilor; and

WHEREAS, in October 2006 Mr. McMillan was elected vice-president, and in October 2007 he was elected president-elect. On October 23, 2008, he was sworn in as president of the North Carolina State Bar; and

WHEREAS, during his service to the North Carolina State Bar, Mr. McMillan has served on the following committees: Fee Dispute Arbitration, Grievance, Grievance Procedures Review, Publications, Justice System, Issues, Ethics 2000, Ethics, Executive, Legislative, Legislative Paralegal Study Committee, Finance and Audit, Facilities, and Special Disciplinary Guidelines Committee; and

WHEREAS, John McMillan took office as president at a most auspicious time in the life of the North Carolina State Bar. He took the oath of office in conjunction with a magnificent celebration of the agency's 75th Anniversary that he personally planned and facilitated. Not only did he orchestrate the affair, he also supplied an actual orchestra, the North Carolina Symphony. Never before, in the annals of professional regulation, was such a wonderful evening had; and

WHEREAS, during his presidency, John McMillan skillfully led the council in its consideration and implementation of a great many initiatives having significance as program and policy. He oversaw the initial presentation of the State Bar's new Distinguished Service Award, whereby the profession honors those of its members who have made extraordinary contributions to their communities and their profession. He animated a process whereby virtually all of the State Bar's programs have been scrutinized as to their effectiveness and their administration, and have consequently been improved. He has been a strong advocate for the inclusion of a new black letter provision in the Rules of Professional Conduct articulating the professional responsibility of every lawyer to provide legal services to persons who cannot fully pay, and he has devoted his considerable parliamentary and diplomatic skills in support of a "comparability" rule for the IOLTA program that will end interest rate discrimination against IOLTA and generate large sums of money to increase access to justice for the citizens of North Carolina; and

WHEREAS, he has carried forward the important work of obtaining a new headquarters for the North Carolina State Bar. His vision, his energy, and his deft maneuvers in that laboratory of human relations known as the General Assembly have sustained the project and inspired those working on it. Although the building is not likely to be completed during Mr. McMillan's tenure as a member of the council, it will, in the fullness of time, be an enduring monument to his leadership; and

WHEREAS, it is believed that John McMillan has served the State Bar as a volunteer longer than anyone in the history of the organization. His service, first as a member of the Disciplinary Hearing Commission, then as its chairman, then as a member of the council, and finally as an officer, has been as momentous as it has been long. He has led from the front with wisdom, steadfastness, and courage. He has enriched us all by his example, and honored us with his fellowship. In more than three quarters of a century we have had many fine presidents, but none better than John McMillan.

NOW, THEREFORE, BE IT RESOLVED that the council of the North Carolina State Bar does hereby publicly and with deep appreciation acknowledge the strong, effective, and unselfish leadership of John McMillan, and expresses to him its debt for his personal service and dedication to the principles of integrity, trust, honesty, and fidelity.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the annual meeting of the North Carolina State Bar and that a copy be delivered to John B. McMillan.

Attorneys Honored with Distinguished Service Awards

The recently-created North Carolina State Bar Distinguished Service Award program honors current and retired members of the North Carolina State Bar who have demonstrated exemplary service to the legal profession.

Janet Ward Black

Janet Ward Black, a principal of Ward Black Law in Greensboro, is a recipient of the State Bar's Distinguished Service Award. Janet Ward earned her Bachelor of Science from Davidson College and her JD from Duke University School of Law. She began her legal career as an assistant district attorney for Cabarrus and Rowan Counties before going into private practice in 1989, primarily in the area of personal injury law.

In 2002, Janet Ward became the third female president of the North Carolina Academy of Trial Lawyers. She also served as the third female president of the North Carolina Bar Association in 2007. Although she has been the recipient of numerous honors throughout her accomplished career, Janet Ward is best known for her work in establishing the North Carolina Bar Association's 4ALL program in 2007. The program's goals are to educate lawyers about the needs of Legal Aid in North Carolina, to lobby members of the state legislative and executive branches for further funding, and to seek monetary donations and *pro bono* services from North Carolina lawyers. During Janet Ward's tenure as NCBA President, the 4ALL program raised close to \$1 million dollars and successfully encouraged more than 1,000 attorneys to donate their time to answer phone calls and give free legal advice.

Janet Ward and her husband, Gerard Davidson, recently completed a multi-week trip to India on behalf of International Cooperating Missions, a non-profit group supporting indigenous Christian pastors and their congregations. Janet Ward is currently a trustee of the

Roscoe Pound Foundation and a member of the Board of Directors of Mercy Mission Teams. She previously served on the Board of Directors for the Women's Resource Center in Greensboro, as a trustee of Hood Theological Seminary, and on the board of the Crisis Council Shelter. Through her numerous efforts and accomplishments, Janet Ward Black has constantly emphasized the necessity of all people having access to the system of justice regardless of race, religion, gender, or social or economic status.

Annie Brown Kennedy

Annie Brown Kennedy, a partner in the law firm of Kennedy, Kennedy, Kennedy and Kennedy, LLP, is a recipient of the Distinguished Service Award. Annie earned her AB in Economics from Spelman College in 1945 and received her JD from Howard University School of Law in 1951. In 1952, Annie was licensed to practice law in Georgia. Soon thereafter, she moved to Winston-Salem and began practicing law as a sole practitioner. When she passed the North Carolina Bar Exam in 1954, Annie became the second African American female to practice law in North Carolina.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, consists of Annie Kennedy and her twin sons Harold Kennedy III and Harvey Kennedy, and formerly

included her husband Harold Kennedy, Jr., who is now deceased. During her 55 years of practice in Forsyth County, Annie has been a dedicated member of numerous bar associations. She served as president of the Forsyth County Bar Association, having been elected as its first female president. Her professional leadership accomplishments also include serving as vice-president of the North Carolina Bar Association.

In 1979, Annie was appointed to the North Carolina House of Representatives by Governor James B. Hunt Jr., and in 1982 was elected to the North Carolina House of Representatives where she represented the 66th Legislative District as the first African-American female ever elected to the North Carolina General Assembly.

Annie has been the recipient of numerous honors and awards, including The Martin Luther King Jr. Drum Major for Justice Award in 1983, The Honorary Doctor of Humane Letters degree from Winston-Salem State University in 1999, and The Margaret Brent Women Lawyers of Achievement Award by the American Bar Association's Commission on Women in the Profession in 2002. Additionally, Annie was inducted into the Hall of Fame of the National Bar Association in 1992. Through her distinguished career and professional leadership, Annie has enhanced the legal profession in North Carolina. ■

2010 Meeting Schedule

Below are the 2010 dates of the quarterly State Bar Council meetings.

January 12 - 15	Marriott Raleigh City Center, Raleigh
April 13 - 16	Marriott Raleigh City Center, Raleigh
July 20 - 23	Carolina Hotel, Pinehurst
October 26 - 29	Marriott Raleigh City Center, Raleigh
	(Election of officers on October 28, 2010, at 11:45 am)

Seeking Distinguished Service Award Nominations

The North Carolina State Bar Distinguished Service Award program honors current and retired members of the North Carolina State Bar throughout the state who have demonstrated exemplary service to the legal profession. Such service may be evidenced by a commitment to the principles and goals stated in the Preamble to the Rules of Professional Conduct, for example: furthering the public's understanding of and confidence in the rule of law and the justice system; working to strengthen legal education; providing civic leadership to ensure equal access to our system of justice for all

those who, because of economic or social barriers, cannot afford or secure adequate legal counsel; seeking to improve the administration of justice and the quality of services rendered by the legal profession; promoting diversity and diverse participation within the legal profession; providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; encouraging and counseling peers by providing advice and mentoring; and fostering civility among members of the bar.

Awards will be presented in recipients' dis-

tricts, usually at a meeting of the district bar. The State Bar Councilor from the recipient's district will participate in introducing the recipient and presenting the certificate. Recipients of the Distinguished Service Award will also be recognized in the State Bar *Journal* and honored at the State Bar's annual meeting in Raleigh. Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, www.ncbar.gov. Please direct questions to Carmen Hoyme at the State Bar office in Raleigh, (919) 828-4620. ■

2010 Appointments to Boards and Commissions

January Council Meeting

Lawyer Assistance Program Board (3-year terms)—There are three appointments to be made. Mark W. Merritt, Burley B. Mitchell Jr., and Fred J. Williams are eligible for reappointment.

April Council Meeting

ABA House of Delegates (2-year terms)—There are three appointments to be made. Calvin E. Murphy, Steven D. Michael, and Robert F. Siler are eligible for reappointment.

Disciplinary Hearing Commission (3-year terms)—There are three appointments to be made. F. Lane Williamson and Tommy W. Jarrett are not eligible for reappointment. M. H. Hood Ellis is eligible for reappointment.

July Council Meeting

Board of Legal Specialization (3-year terms)—There are three appointments to be made. Edward P. Tewkesbury is not eligible for reappointment. J. Matthew Martin and Dr. David A. Hayes are eligible for reappointment.

IOLTA Board of Trustees (3-year terms)—There are three appointments to

be made. Robert A. Wicker, Larry S. McDevitt, and Jean P. Hollowell are not eligible for reappointment.

October Council Meeting

Client Security Fund Board (5-year terms)—There is one appointment to be made. G. Thomas Davis Jr. is not eligible for reappointment.

Board of Law Examiners (3-year terms)—There are five appointments to be made. Gail C. Arneke is not eligible for reappointment. Randal E. Phillips, Emil F. Kratt, Elizabeth C. Bunting, and Beth R. Fleishman are eligible for reappointment.

Board of Continuing Legal Education (3-year terms) - There are three appointments. Keith O. Gregory, Gary W. Thomas, and Cynthia L. Turco are not eligible for reappointment.

NC LEAF (1-year terms)—There is one appointment to be made. William R. Purcell is eligible for reappointment.

State Judicial Council (4-year terms)—There is one appointment to be made. Gary W. Thomas is not eligible for reappointment.

Board of Paralegal Certification (3-year terms)—There are three appoint-

ments to be made. Marisa S. Campbell and Sharon L. Wall are not eligible for reappointment. G. Gray Wilson is eligible for reappointment.

Thank You to Our Meeting Sponsors

Yates McLamb & Weyher, LLP for sponsoring the Annual Reception and Dinner

North Carolina Lawyers Weekly for sponsoring the Annual Reception and Dinner

Legal Directories Publishing Company, Inc. for sponsoring the Councilors' Dinner

Lawyers Mutual Liability Insurance Company for sponsoring the Annual Reception and Dinner

Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, former Chief Justice Henry Frye, addressed the gathering, and each honoree was presented a certificate by the president of the State Bar, John B. McMillan, in recognition of his or her service. After the ceremonies were concluded, the honorees in attendance sat for the photograph below. ■



First Row (Left to Right): Jack Morton, Koy Dawkins, Leslie Frye, Louis Burney, William Blossom, David Henderson, James Sugg, Jack Webster, Daniel Perry *Second Row (Left to Right):* Daniel Park, Konrad Fish, Robert Collier, Henry Frye, Alfred Cleveland, Nick Miller, William McCullough, George Coggin, R. C. Soles, Frank Wyatt

Law School Briefs (cont.)

policy has been to include provisions on labor and environmental protection in its bilateral and regional free-trade agreements.

Those agreements, which now encompass more than a dozen countries, have continued to follow the general approach taken by the NAFTA labor and environmental agreements, at the same time that the NAFTA agreements have themselves remained widely criticized and poorly understood. This symposium examined the 15 years of experience with the NAFTA agreements, as well as the variations adopted by subsequent free-trade agreements, with a view

to assessing how successful the agreements have been, and whether the "NAFTA model" should be continued, modified, or replaced with another approach altogether.

"We now have 15 years of experience with the NAFTA labor and environmental agreements, as well as significant experience with subsequent US efforts to build blue and green protections in its free trade agreements," Professor John Knox says. "Particularly in light of President Obama's pledge to renegotiate NAFTA, it seems like a good time to assess that experience and analyze whether the United States should adopt a new approach to labor and environmental

protections in trade agreements."

Speakers on the International Trade and Labor Panel included Ed Gresser, Democratic Leadership Council; Kevin Kolben, Rutgers Business School; Marley Weiss, University of Maryland School of Law; and Ian Taplin, WFU professor of sociology, management, and international studies.

The International Trade and Environment Panel included Dave Markell, Florida State University College of Law; Chris Wold, Lewis and Clark Law School; Howard Mann, International Institute for Sustainable Development; and John Knox, Wake Forest law professor. ■

Featured Artist—Mary Kay Kennedy

"Many people believe that photographs tell the truth, I believe that photographs lie. The photographer allows the viewer to see only what the photographer wants, eliminating the seconds before and after, omitting everything outside the frame that they do not want you to see; creating a deception. The mark of a great photograph is one that leaves the viewer believing that what is in front of their eyes is the only thing that was there, they do not need or want to see beyond the edges of the frame."



Mary Kay Kennedy's interest in photography was piqued when her uncle gave her an old 110 film camera at the age of 12. It was not until college, however, that she became serious about pursuing photography as an artist. It was then that she realized photography's unique ability to allow the artist to manipulate reality and transform things seen every day into mysterious and beautiful vignettes. Kennedy grew up in Glendale, Arizona, graduated in 2003 from Arizona State University with a BFA in photography, and has been involved in the arts since graduation. She currently resides in Raleigh, North Carolina, where she manages a fine art gallery and continues to pursue her art career. She is a member of the Visual Art Exchange, Raleigh's oldest non-profit arts organization, where she has participated in several exhibitions including feature artist

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of the State Bar building. The artworks enhance the exterior of our building and provide visual interest to pedestrians passing by on Fayetteville Street. The State Bar is grateful to The Collectors Gallery, the artists' representative, for arranging this loan program. The Collectors Gallery is a full service gallery that represents national, regional, and North Carolina artists, and provides residential and commercial consulting. Readers who want to know more about an artist may contact Rory Parnell or Megg Rader at TCG, 443 Fayetteville St., Raleigh, NC 27601 (919.828.6500).

exhibits in 2007 and 2008. She is very involved in the arts community, donating time, money, and art to groups throughout Raleigh. Her works have been exhibited in North Carolina and southern California and are held in corporate collections including Credit Suisse in Raleigh and Quintiles, Inc. in Wilmington, North Carolina. ■

Discipline (cont.)

unlawful charging lien against his former client. He rejected the Grievance Committee's reprimand. After Anderson acknowledged the wrongfulness of his conduct, he was admonished by the DHC in a consent order of discipline.

Dismissals by the DHC

After an evidentiary hearing, the DHC dismissed the State Bar's disciplinary case against **David McGuire** of Raleigh.

Petitions for Reinstatement

Winston-Salem lawyer **Shonna Alexander** was reinstated on October 27, 2009, from a suspension imposed by the DHC.

Notice of Intent to Seek Reinstatement

Individuals who wish to note their concurrence with or opposition to these petitions should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before February 1,

2010 (60 days from publication).

In the Matter of Michael L. Yopp

Notice is hereby given that Michael L. Yopp of Dunn, North Carolina, intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Yopp surrendered his law license and was disbarred July 19, 2002, for misappropriating client funds for his personal benefit, over-disbursing client funds, and failing to reconcile his trust account. ■

Client Security Fund Reimburses Victims

At its October 22, 2009, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$64,728.70 to six clients who suffered financial losses due to the misconduct of North Carolina lawyers.

The new payments authorized were:

1. An award of \$750 to a former client of Charles Alston Jr. of Charlotte, North Carolina. The board found that Alston was retained to represent the client in getting a criminal charge expunged. Alston failed to provide any valuable legal services for the fee paid. Alston was disbarred on October 2, 2008. The board previously reimbursed 11 other Alston clients a total of \$37,447.30.

2. An award of \$3,746.60 to a former client of Roger Cardinal of Charlotte, North Carolina. The board found that Cardinal handled a refinance closing for a client. The checks Cardinal issued from the closing failed to clear before the State Bar froze Cardinal's trust account due to his misappropriation. Cardinal's trust account balance was insufficient to pay all his clients' obligations due to his misappropriation. Cardinal was disbarred on December 26, 2008. The board previously reimbursed seven other Cardinal clients a total of

\$34,441.71.

3. An award of \$350 to a former client of Fredrick Pierce of Raleigh, North Carolina. The board found that Pierce was retained to represent a client on criminal charges. Pierce failed to provide any valuable legal services for the fee paid. Pierce was suspended on February 27, 2009. The board previously reimbursed one other Pierce client \$1,600.

4. An award of \$300 to a former client of Fredrick Pierce. The board found that Pierce was retained to represent a client on traffic offenses. Pierce failed to provide any valuable legal services for the fee paid.

5. An award of \$3,854.64 to a former client of Michelle Shepherd of West Jefferson, North Carolina. The board found that Shepherd handled a real estate closing for a client. The check Shepherd issued from the closing proceeds failed to clear before the State Bar froze Shepherd's trust account due to her misappropriation. Shepherd's trust account balance was insufficient to pay all her clients' obligations due to her misappropriation. Shepherd was disbarred on July 25, 2008. The board previously reimbursed nine clients a total of \$243,847.25, and reimbursed 88 other clients their embezzled

title insurance premiums on an expedited basis an additional total of \$33,737.11.

6. An award of \$55,727.46 to former clients of Michelle Shepherd. The board found that Shepherd handled two 1031 like kind exchange closings for clients and held some of the exchange funds in escrow as a deposit on other properties. The deposit was frozen in Shepherd's trust account by the State Bar after it was discovered that Shepherd had misappropriated funds from her trust account. Shepherd's trust account balance was insufficient to pay all her clients' obligation due to her misappropriation. ■

Notice to All Attorneys

Estate Protector Plan

—is no longer registered with the North Carolina State Bar as a prepaid legal services plan. No North Carolina licensed attorney may participate in this plan since it is not registered as a prepaid legal services plan.

Donald H. Jones, Director of Investigations 1989-2009



Jones

Donald H. Jones, who served as the State Bar's Director of Investigations, died on October 17, 2009.

At the time of his death, Don directed a team of 13 State Bar employees responsible for investigating allegations of professional misconduct by lawyers. Although his department investigated between 1,500

and 1,600 cases a year, somehow Don could always recall, off the top of his head, what was going on with every case. He had excellent judgment and instincts. He seemed to know when an allegation was going to prove true and when it wasn't going anywhere. While Don strongly believed in justice, he was also compassionate. He did not wish any lawyer ill, but he knew that a lawyer who had betrayed the public trust could not be a lawyer anymore.

Don joined the State Bar in 1989 after serving the State of North Carolina for 19

years in the Department of Revenue, the Department of Justice, and the SBI's Financial Crimes Unit.

Don had wonderful leadership qualities. The people in his department held him in the highest esteem and would do anything to avoid letting him down.

Don was a great friend. He was completely loyal. He always asked how he could help, personally and professionally, and he meant it. He will be missed.

He is survived by his devoted wife Joey, his children and grandchildren, and his State Bar family. ■

Annual Reports of State Bar Boards

Board of Legal Specialization

Submitted by Michael E. Weddington, Chair

This is a banner year for the specialization program: we received more applications for certification this year than in the 20-plus year history of the program. In the spring, 102 certification applications were received from lawyers drawn from the diverse North Carolina legal community: 47% of the applicants are from firms of eight lawyers or less; 39% have five to seven years of practice experience but 26% have over 21 years of experience; and 45% of applicants are from rural areas or small cities. Ninety-four applicants were ultimately approved to sit for the certification exams which will be administered in two weeks.

Some of those sitting for the exams in early November will be taking an exam in elder law, our newest specialty, approved by this council last year. Identifying lawyers who are experienced and skilled in elder law will not only help consumers, it will also help lawyers who need to refer an aging client to a competent elder law practitioner. The specialties with the highest number of applications were elder law, family law, and real property. Interestingly, the Real Property Specialty Committee anticipated very few applications this year because of the impact of the "down" economy on the housing market. In fact, the number of applications for real property certification is higher this year than in the past decade. Based upon an informal survey of the applicants, it appears that real property lawyers see board certification as one way to distinguish themselves in a difficult legal market.

Each year the board rejects several applications because the applicants cannot satisfy one or more requirements for certification. Although the board struggles with all application denials, the task is relatively straightforward when the lawyer cannot demonstrate that he or she is substantially involved in the practice area or that he or she has completed the required CLE credits. It is an extremely difficult task when the reason the application is rejected is inadequate peer review. In other words, the peer references provided by the lawyer raise questions about the applicant's qualification for certification either because of lack of proficiency in the practice area or because of ethical or professional shortcomings.

Each year, there are two or three formal

appeals by lawyers whose applications are rejected by the board. Unfortunately, the rules for the specialization program currently provide for an appeal process that is cumbersome and unnecessarily adversarial. The board believes that the appeal rules should be overhauled to (1) guaranty notice and an opportunity to be heard; and (2) to eliminate formal hearings in favor of an informal opportunity for the applicant to respond and to learn from the process. A request to publish revisions to the specialization appeals rules is before you today. We urge you to approve their publication for comment. If you have any questions about the proposed amendments when they are before you for consideration, I am sure Alice Mine can answer them.

There are now 704 legal specialists in North Carolina. They are certified in eight practice areas. More than 100 lawyers applied for recertification this summer. Recertification is required every five years in order for a specialist to retain certification. Each year approximately 95% of the specialists eligible for recertification apply. This indicates that specialists find long-lasting benefit in certification.

In each edition of the *State Bar Journal*, there is an article that profiles a board certified specialist. The purpose of the article is to honor the chosen specialist, but also to explain the benefits of the program and its accessibility to everyday practitioners. This year, we published profiles of Jill Raspet, an estate planning specialist in Wilmington; Rayford "Trip" Adams and his daughter Jennifer Adams, bankruptcy specialists who practice together in Greensboro; Christa McGill and Virginia Noble, a team of Social Security Disability specialists practicing together in Durham; and, in the upcoming edition, Eden lawyer Joseph Maddrey, board certified in real property law, who represents the 17A district on this council.

The annual luncheon for certified specialists was held in April in Greensboro. It was another opportunity to recognize specialists by presenting its fourth annual awards. The awards are named in honor of past chairs of the Board of Legal Specialization. The Howard L. Gum Excellence in Committee Service Award is given to a specialty committee member who consistently excels in fulfilling committee responsibilities. This award was presented to William "Ned" Manning, from Kinston, a residential real property law specialist since 2000, and a for-

mer chair of the Real Property Law Specialty Committee.

The James E. Cross Leadership Award is presented to a certified specialist who has taken an active leadership role in his/her practice area. Wilson lawyer R. Woody Harrison, board certified in residential real property law since 1987, received this award.

The Sara H. Davis Excellence Award is given to a certified specialist who exemplifies excellence in his/her daily work as a lawyer and serves as a model for other lawyers. Lana Starnes Warlick, a family law specialist since 1989, who practices in Jacksonville, was presented with this award. In July, the board welcomed Ms. Warlick as its newest member. She is taking the seat vacated by Dallas Clark. Dallas's leadership and humor will be missed but we are pleased that the council has appointed another stellar lawyer to the board.

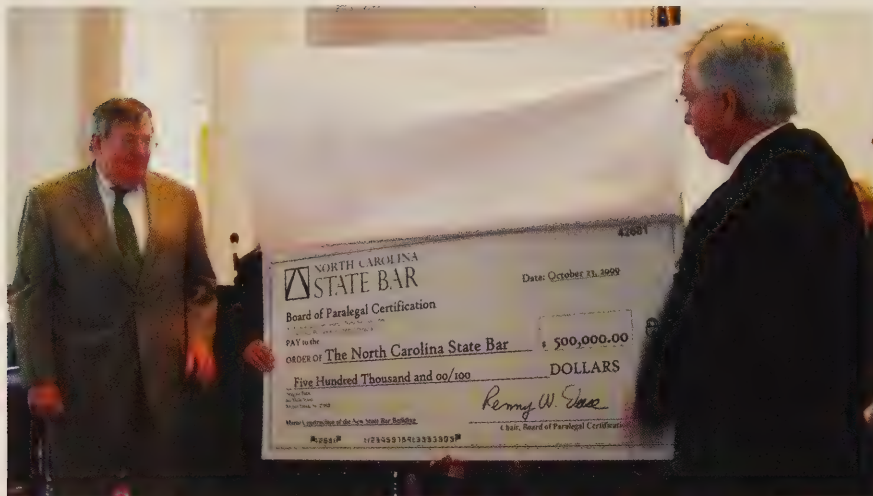
The specialization program is meeting its two primary objectives while remaining on a firm financial footing. Those objectives are to identify qualified practitioners to the public and to improve the competency of the bar. We will continue to meet these objectives by establishing specialties in areas appropriate for certification and by applying reasonable, objective standards for certification that protect the interests of the public. The board and all certified specialists greatly appreciate the continuing support and the assistance of the council in meeting these objectives.

Board of Paralegal Certification

Submitted by Renmy Deese, Chair

The Board of Paralegal Certification accepted the first application for certification on July 1, 2005. Since that date, almost 5,200 applications have been received by the board and, I am proud to report, there are currently 4,305 North Carolina State Bar certified paralegals.

Paralegals are now certified upon successful passage of a rigorous exam. Certified paralegals must demonstrate knowledge in key practice areas and possess the necessary skills to provide competent assistance to lawyers. In 2008, 132 paralegals were certified by exam. To date in 2009, we have certified 75 paralegals by exam. The passage rate on the 2008 and 2009 exams were, respectively, 70% and 82%. We are waiting for the results of the 143 candidates who took the October certification exam.



Paralegal Certification Program Presents Check for New State Bar Facility—"It was with great joy and pride that we gave the \$500,000 donation to the State Bar building fund on behalf of the Paralegal Certification Program. The State Bar supported us in extending a \$50,000 'loan' to the program at its inception, a mere four years ago, and for us to now be able to demonstrate our support and gratitude to the State Bar and legal community for their trust and confidence is very satisfying," said Renny W. Deese (right), chair of the Board of Paralegal Certification. Then State Bar President John B. McMillan (left) accepted the check stating, "We are extremely grateful to the Paralegal Board for their generous contribution to the State Bar's new headquarters building."

The exam is written by the Certification Committee which is composed of seven exceptionally dedicated and hard-working paralegal educators, both lawyers and nonlawyers, who have devoted countless unpaid hours to the creation of a three-hour, 150 question multiple-choice examination that is comprehensive, rigorous, and fair. The exam tests the following legal subjects: civil litigation, commercial law, criminal law, ethics, family law, legal research, real property, and wills, trusts, and estate administration; and the following practice domains: communication, organization, documentation, analysis, and research. The committee revises and updates the exam prior to each bi-annual administration and works with a professional psychometrician to insure the validity and reliability of the test results. We are grateful for the volunteer service of the following members of the Certification Committee: Virginia M. Burrows, Susan H. McIntyre, Leslie D. McKesson, Teresa (Terry) Irvin, Cheryl Waltz Smith, Mary E. Willard, and chair Lisa M. Duncan.

To maintain certification, during each 12-month period of certification, a certified paralegal must earn six hours of continuing paralegal education (CPE) credits, including one hour of ethics. We estimate that certified paralegals took over 25,000 hours of CPE in the last 12 months. This is a clear demonstration that one

goal of the program has been met (quoting from The Plan for Certification of Paralegals): "to improve the competency of [certified paralegals] by establishing mandatory continuing legal education and other requirements of certification."

Over the past 12 months, the board has accomplished the following:

- Certified 150 paralegals by exam.
- Recertified 4,007 paralegals.
- Administered the exam to 234 applicants for certification.
- Held information sessions for paralegal students.
- Taught CPE programs on professional responsibility.

As the chair of the board of paralegal certification, it is my pleasure to report that, due to prudent and frugal management and an efficient and productive staff, the program has been "in the black" financially since its inception and has accumulated significant excess funds. This felicitous and unexpected byproduct of the success of the program led to the appointment of a committee to study how to use those excess funds. Earlier this year, the committee recommended that the board take advantage of a unique opportunity to contribute to the North Carolina legal community. The board unanimously agreed. Therefore, it is with great pride that I present to President McMillan a check in

the amount of \$500,000 as the contribution of the paralegal certification program to the construction of the new State Bar building. Paralegals—especially certified paralegals—play an important and ever-expanding role in the delivery of legal services in North Carolina; this gift, which will help to build the foundation of a new State Bar building, symbolizes and memorializes that role.

The Board of Paralegal Certification looks forward to continued success as an integral part of the North Carolina State Bar.

Board of Continuing Legal Education

Submitted by Susan H. Hargrove, Board Member

Despite bad economic times, lawyers continue to meet and exceed their mandatory CLE requirements and I am pleased to report that 99% of the active members of the North Carolina State Bar complied with the mandatory CLE requirements for 2008. By mid-March 2009, the CLE department processed and filed over 21,135 annual report forms for the 2008 compliance year. North Carolina lawyers took a total of 311,593 hours of CLE in 2008, or 13.5 CLE hours on average per lawyer. This is 1.5 hours above the mandated 12 CLE hours per year and a slight decrease from 2007 when lawyers took an extra two CLE hours on average.

It is helpful, on occasion, to revisit the mission of the CLE program as set forth in the State Bar rules over 20 years ago:

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve...At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition...and are increasing in complexity. One cannot render competent legal services without continuous education and training...The purpose of these minimum continuing legal education requirements is the same as the purpose of the Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

To fulfill this mission, the board continues to look for ways to ensure that quality, relevant CLE programming is convenient and available, at an affordable price, to lawyers in rural as well as urban settings across the state. For example,

the board is studying whether more on-line CLE should be permitted and, if so, what requirements should be imposed on providers to guaranty quality programming. In the spring, the board invited Professor Judith Wegner of UNC School of Law to its annual retreat to present the findings of a study on educating lawyers by The Carnegie Foundation for the Advancement of Teaching and to lead the board in a discussion of how those findings might be used to improve continuing legal education. A board committee has been established to continue this investigation into how the board can encourage programming that is interactive, challenging, and designed to engage lawyers in lifelong learning.

The board supports the endeavors of the Chief Justice's Equal Access to Justice Commission and is pleased that the Supreme Court recently approved the increase of the CLE sponsor/attendance fee from \$2.25 to \$3.00 per credit hour to provide financial support for the commission. In the future, we ask that the council remain cognizant of the mission of the CLE program and be reticent to use the sponsor/attendance fees for purposes that are unrelated to that mission.

The board strongly supports the proposed 12-hour professionalism requirement for newly admitted lawyers which we understand will be considered by the council today. This requirement will help new lawyers start the practice of law with a solid understanding of their professional and ethical obligations; it goes to the heart of the mission to ensure that the public is served by lawyers who are competent. Please let us know how the board can advance the council's objectives with regard to this initiative.

The board continues to operate on a sound financial footing and, in 2009, was able to provide \$246,681.00 in funding for the support of the Lawyers Assistance Program.

After six productive years, Judge Robert B. Rader is leaving the board. Judge Rader joined the board in 2003 and has been its chairman since 2006. His measured practical approach to the issues that come before the CLE board will be greatly missed.

The board will continue to strive to improve the program of mandatory continuing legal education for North Carolina lawyers. We welcome any recommendations or suggestions that councilors may have in this regard. On behalf of the other members of the board, I would like to thank you for the opportunity to contribute to the protection of the public by advancing the competency of North Carolina lawyers.

Client Security Fund

Submitted by Janice M. Cole, Chair

Pursuant to the Rules of Administration and Governance of the Client Security Fund of The North Carolina State Bar (the "Fund"), the Board of Trustees submits this annual report covering the period October 1, 2008, through September 30, 2009.

The Fund was established by order of the Supreme Court dated October 10, 1984, and commenced operations January 1, 1985. As stated by the Supreme Court, the purpose of the Fund is "... to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court and [the] Rules, clients who have suffered financial loss as a result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina..."

Claims Procedures

The Fund reimburses clients of North Carolina attorneys where there was wrongful taking of the clients' money or property in the nature of embezzlement or conversion, which money or property was entrusted to the attorney by the client by reason of an attorney/client relationship or a fiduciary relationship customary in the practice of law. Applicants are required to show that they have exhausted all viable means to collect those losses from sources other than the Fund as a condition to reimbursement by the Fund. Specific provisions in the Rules declare that certain types of losses are non-reimbursable.

All reimbursements are a matter of grace in the sole discretion of the board and not a matter of right. Reimbursement may not exceed \$100,000 to any one applicant based on the dishonest conduct of an attorney.

The Board of Trustees

The board is composed of five trustees appointed by the council of the State Bar. A trustee may serve only one full five-year term. Four of the trustees must be attorneys admitted to practice law in North Carolina and one must be a person who is not a licensed attorney. Current members of the board are:

Janice McKenzie Cole, chair, practices law in Hertford.

G. Thomas Davis Jr., vice-chair, practices law in Swan Quarter.

Sara H. Davis is with the firm of Westall, Gray, Connolly & Davis, PA, in Asheville.

Michael Schenck, the public member of the board, is a former CFO of Penick Village in

Southern Pines and is retired and living in Raleigh.

M. Ann Reed, a former president of the North Carolina State Bar, is the senior deputy in the Administrative Division of the Attorney General's Office.

Subrogation Recoveries

It is standard procedure to send a demand letter to each attorney or former attorney whose misconduct results in any payment, making demand that the attorney either reimburse the Fund in full or confess judgment and agree to a reasonable payment schedule. If the attorney fails or refuses to do either, suit is filed seeking double damages pursuant to N.C.G.S. §84-13 unless the investigative file clearly establishes that it would be useless to do so.

In cases in which the defrauded client has already obtained a judgment against the attorney, the Fund requires that the judgment be assigned to it prior to any reimbursement. In North Carolina criminal cases involving embezzlement of client funds by attorneys, our counsel, working with the district attorney, is sometimes able to have restitution ordered as part of the criminal judgment.

Another method of recovering amounts the Fund pays to clients of a dishonest attorney is by being subrogated to the rights of clients whose funds have been "frozen" in the attorney's trust account during the State Bar's disciplinary investigation. When the court disburses the funds from the trust account, the Fund gets a pro-rata share.

During the year covered by this report, the Fund recovered \$77,108.35 as a result of these efforts. Hopefully, our efforts to recover under our subrogation rights will continue to show positive results.

Claims Decided

During the period October 1, 2008 - September 30, 2009, the board decided 168 claims, compared to 165 claims decided the previous reporting year. Thirty-one of those claims were for title insurance premiums received by one attorney who failed to purchase title insurance for the applicants and embezzled the money. Those claims were handled on an expedited basis by our counsel under guidelines approved by the board. For various reasons under its rules, the board denied 79 of the 168 claims in their entirety. Of the 89 remaining claims, some were paid in part and some in full. Reimbursements of those 89 claims totaled \$492,201.23, an average of \$5,530.35 per

claim. The largest amount paid on a single claim was \$100,000, and the smallest amount paid was \$50. The most common basis for denying a claim in its entirety is that the claim is a "fee dispute" or "performance dispute." That is, there is no allegation or evidence that the attorney embezzled or misappropriated any money or property of the client. Rather, the client feels that the attorney did not earn all or some part of the fee paid or mishandled or neglected the client's legal matter. However meritorious the client's contentions may be, the Fund is not permitted to reimburse the clients in those cases because of the requirement in the rules that a wrongful taking of money or property in the nature of embezzlement or conversion must be shown.

Funding

The 1984 order of the Supreme Court that created the Fund contained provisions for an assessment of \$50 to provide initial funding for the program. In subsequent years, upon being advised of the financial condition of the Fund, the Court in certain years waived the assessment and in other years set the assessment in varying amounts to provide for the anticipated needs of the Fund.

In 2006, the Supreme Court approved a \$25 assessment per active lawyer that will continue from year to year until circumstances require a modification. There is no need for a change in the assessment for calendar year 2009.

Financial Statements

A copy of the audited financial statement of the Fund as of September 30, 2009, has previously been furnished to each member of the council.

Conclusion

The Board of Trustees wishes to convey to the council our sincere appreciation to the staff personnel who have assisted us so effectively and generously during the past year. Without the continuous support of these people, our tasks would be much more difficult. We also express our appreciation to the Bar of North Carolina for their continued support of the Client Security Fund and their efforts in reducing the incidents of defalcation on the part of a few members of our profession.

Lawyer Assistance Program

Submitted by Mark Merritt, Chair

It has been a busy and productive year for the North Carolina Lawyer Assistance Program

("LAP"). The State Bar's rule governing the Lawyer Assistance Program provides:

.0601 Purpose

The purpose of the Lawyer Assistance Program is to: (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

The LAP is fulfilling its mission. In its 30th year of operation, the LAP responded to numerous calls and had many personal interviews with lawyers, judges, and law students. These contacts resulted in a current caseload as of the end of September of 575 cases.

Since 2000, the LAP has assisted over 1,696 lawyers, or approximately 8.6% of the Bar. The individuals we serve often include the Bar's most disadvantaged and distressed members.

Of our current files, 46% were opened as a result of voluntary contacts by a lawyer, judge, or law school student seeking assistance. The majority of the other files were opened after other members of the bar expressed concern to the LAP about an impaired lawyer. With respect to the cases that were opened, 55% involved psychological or mental health disorders, and 45% involved substance abuse or chemical addiction. The LAP handled nine files which involved preadmission issues referred by the Board of Law Examiners.

In 2007 the State Bar Council asked for there to be greater coordination between the Office of Counsel and the Lawyer Assistance Program in cases where the discovery or potential discovery of misappropriated client funds might lead to a suicide risk. The LAP has continued to be proactive in this context when it became aware of lawyers facing the likelihood of disbarment and offering assistance to the lawyer.

The LAP has participated during the past year in a "Well Being in the Workplace" survey sponsored by the North Carolina Consortium of Professional Recovery Programs ("CPRP"). The CPRP survey data collection has been completed. Dr. Darcy Siebert, formerly of Florida State University, now at Rutgers, is in the process of analyzing the data. She expects survey results data will be available in early 2010 and will be sent to the LAP along with an analysis of the kinds of mental health issues that affect our lawyers. This data should be very helpful in assisting

the LAP to better meet the needs of the lawyers we serve.

The LAP internet site remains an important source of information about the LAP and how to contact the program. The website provides a listing of the members of the PALS Committee and the FRIENDS Committee, the two LAP peer group support committees, as well as information about depression and chemical addiction. Many calls came from lawyers who first consulted the website.

The LAP website also contains pages which provide a comprehensive list of resources and confidential self-tests for substance abuse and depression. In addition, the website provides information about the two annual training workshops for volunteers and a library of articles related to topics relevant to lawyer assistance.

As has been true over the years, the LAP network of volunteers and lawyer support groups provide a major part of the assistance given by the LAP to lawyers around the state. Without the extended volunteer network, it would be impossible for the LAP to be as effective as it has been during the past year. Staff and volunteer efforts have prevented or limited possible harm to the public in numerous instances. In cases where discipline is initially deferred, or the lawyer is operating under a stayed suspension, the LAP's intervention has offered the opportunity to identify and resolve the root problems out of which the discipline issue arose and furthered the Bar's mission of protecting the public.

Details of the North Carolina Lawyer Assistance Program

The LAP provides assessment, referral, intervention, education, advocacy, and peer support services for all North Carolina lawyers and judges.

The LAP is designed to help lawyers find a way to address a wide range of health and personal issues, including, most commonly, alcohol/drug abuse, stress/burnout, depression, anxiety, and compulsive disorders of all kinds, including those involving food, sex, work, gambling, and the Internet.

All calls are strictly confidential.

Educational Outreach

The North Carolina Lawyer Assistance Program believes that intervention begins with educating all segments of the bench, bar, and law schools about addiction, mental health issues, compulsive disorders, and recovery from those conditions. The LAP efforts have contin-

ued this year through presentations at law schools, ethics CLE workshops, and local and specialty bar association meetings.

The Lawyer Assistance Program sponsored several presentations and video presentations across the state in 2008-2009.

LAP Information Flyers/Brochures

- LAP (four-fold) flyer: North Carolina Lawyer Assistance Program

- PALS: Alcoholism and Other Chemical Addictions

- FRIENDS: Depression and Mental Health

- A Guide for North Carolina Judges: Dealing with an Impaired Lawyer

- Black Lawyers Association Leadership Urges Members Use of Lawyer Assistance Program

- Breaking the Silence - Lawyer Suicide

- A Chance to Serve

- Welcome to the Legal Profession

- Women Bar Leaders Encourage Use of Lawyer Assistance Program

- Impairment in the Legal Profession - A guide for New Bar Councilors and Local Bar Leaders

LAP flyers/brochures are included in new lawyer packages, volunteer packages, requests for information by prospective clients and in CLE programs. Approximately 720 LAP flyers/brochures were distributed in the presentations made this past year with 325 Welcome Flyers/brochures distributed to new admittees.

The LAP book *A Lawyer's Guide to Healing* has been distributed as part of the LAP outreach.

Articles

PALS and FRIENDS columns were submitted quarterly to the *State Bar Journal*. Monthly articles were submitted to the *Campbell Law Observer* to develop awareness of the Lawyer Assistance Program and issues that may lead to impairment in lawyers.

Volunteer Development

Substantial efforts continue to be devoted to volunteer development. As of September 30, 2009, there were 136 PALS volunteers and 97 FRIENDS volunteers.

Training

FRIENDS 10th Annual Conference was held at Pine Needles Lodge & Conference Center, Southern Pines, North Carolina, on February 9, 2009. This conference was in conjunction with BarCares and the NC Bar Association Quality of Life Committee.

ABA Annual CoLAP Conference was held

in Little Rock, Arkansas, October 21-24, 2008.

The 29th Annual PALS Meeting and Workshop was held November 7-9, 2008, at the Holiday Inn Sunspree, Wrightsville Beach, North Carolina. Chief Justice Sarah Parker was in attendance. Guest speakers included Dr. Melissa Warner and Kristi and Todd Webb.

Upcoming Events for 2010

FRIENDS 11th Annual Conference will be held at Pine Needles Lodge & Conference Center, Southern Pines, North Carolina on February 27, 2010. This conference will be again be in conjunction with BarCares and the NC Bar Association Quality of Life Committee.

The 30th Annual PALS Conference and Workshop will be held November 7-9, 2009, at the Broyhill Inn & Conference Center, Boone, North Carolina.

Local Volunteer Meetings:

The Lawyer Assistance Program continues the development of local volunteer meetings to provide greater continuity and support in meeting the needs of lawyers new in recovery and allowing volunteers the chance to grow in their own recoveries. Local volunteer support meetings for PALS and FRIENDS are held in several locations. Details on meeting locations are available on the LAP website, www.nclap.org.

Volunteer Communication

The LAP sends out *The Intervenor*, a newsletter, to all PALS Volunteers three to four times a year to enhance communication among the volunteer network. Volunteers have contributed by writing articles for *The Intervenor* and by sharing personal stories in the *Campbell Law Observer* (CLO) and the *State Bar Journal*.

Case Management

Case management has four different stages:

1. Investigation - Initial contact with the program begins the investigative phase. All efforts at this stage are directed to determining if the lawyer has a problem LAP can assist with, the nature of the problem, and if the client is willing to get assistance.

2. Treatment/Stabilization - This phase begins when a lawyer understands that he/she needs help and agrees to obtain assistance.

3. Monitoring/Aftercare - This begins when a lawyer has completed inpatient/outpatient treatment or initial therapy consultations and is stabilized in a recovery program. In this stage, the volunteer support is most active and helpful.

4. Inactive Status - A file is placed on inactive status when the active role of the LAP terminates. This may occur when the lawyer completes an initial two-year contract of monitoring and no longer needs a monitor, lawyer dies, moves out of state, is disbarred, or no longer wants any assistance.

Case Management Statistics

Statistics about the program reflect the number of people getting help; they do not reflect the time it takes to deliver that assistance. A self-referral might be appropriate for a phone evaluation and be immediately directed to a treating counselor to meet his/her needs. On the other hand, a third-party initiated investigation may take weeks to complete and, even then, the file may be put on hold for months in order for there to be sufficient opportunity to ascertain if the lawyer truly needs assistance. Every effort is made not to interfere by offering assistance unless there is meaningful evidence suggesting that it is needed or the lawyer is actively seeking help. Even then, in the addictions area, assistance when offered is often initially refused, and the LAP may spend months building up trust so that assistance can be received when the lawyer finally becomes receptive. Like cases in law practice, the problem cases can often take tremendous amounts of time to move forward. Our approach is never to give up on offering help, but often that means waiting until a situation ripens. To be able to make client access to the LAP easier, the state of North Carolina is divided into three sections. Don Carroll handles cases in the western part of the state. Towanda Garner handles the piedmont section and Ed Ward the eastern part of the state. Any lawyer may seek the help of any member of the professional staff. The continued expansion and utilization of trained volunteers will remain a key component in our future ability to bring assistance to more lawyers who need it.

Outcome Data

The cases that have been coded as successfully handled are a broad category that emphasizes help to the lawyer. First and foremost, this includes cases where the client had a significant problem, entered into a recovery contract with the LAP, and successfully completed the contract. In addition, it includes cases where there was informal assistance given and a positive result achieved for the lawyer. This category also includes (1) cases where an investigation was

CONTINUED ON PAGE 86

February 2010 Bar Exam Applicants

The February 2010 Bar Examination will be held in Raleigh on February 23 and 24, 2010. Published below are the names of the applicants whose applications were received on or before October 19, 2009. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Fred P. Parker III, Executive Director, Board of Law Examiners, PO Box 2946, Raleigh, NC 27602.

John Hampton Aaron Newport News, VA	Ellen Bluestone Asheville, NC	Columbia, MO	Seraka Davis Durham, NC	Winston-Salem, NC
Lynn Abbott Davie, FL	David Bolek North Charleston, SC	John Richard Champion Chapel Hill, NC	Jose' Gladstone Dees Brandywine, MD	Elizabeth Foley Winston-Salem, NC
Faheemah Mahasin Abdullah Durham, NC	Dan Wilson Bolton III San Antonio, TX	Judy Chang Los Angeles, CA	Lindsey DeGuerre The Woodlands, TX	Ashley Donahue Fox Cary, NC
John Knox Abernethy Winston-Salem, NC	Carolyn Green Boone Durham, NC	Thomas Chapman Charlotte, NC	Joseph Delk IV Mount Pleasant, SC	Anthony Theodore Fraune Raleigh, NC
Shea Airey Salem, SC	Andrea Bosquez-Porter Fuquay-Varina, NC	Kristan Cheng Boston, MA	Matthew Dellinger Spartanburg, SC	Gonzalo Emilio Frias Charlotte, NC
Phillip Albergetti Pawleys Island, SC	Kevin Wade Boughman Ayden, NC	Justin Allen Chin Monroe, NC	David Demers Charlotte, NC	Michael Fulkerson Charlotte, NC
Jeffrey Edward Alexander Charlotte, NC	Gary James Bowers Lexington, NC	Nalina Victor Chinnasami HighPoint, NC	Carly Marie Denning Raleigh, NC	Tiffany Nicole Fullwood Spplly, NC
Damita Charmaine Allen Morrisville, NC	Pamela Bradford Matthews, NC	Jeong Yeong Cho Seoul, South Korea	Jon Eugene DeVore II Concord, NC	Thomas Gallagher Asheville, NC
Vernetta Rinoa Alston Raleigh, NC	Timothy Bradley Ferndale, MI	Tara Nicole Cho Durham, NC	Michelle Dexter Cary, NC	Michael Ganley Raleigh, NC
Leigh Altman Charlotte, NC	J. Jerome Brady Columbus, OH	Jinwook Choi Buford, GA	Chad Diamond Raleigh, NC	Melba Lisa Garcia Lawton, MI
Marie-Jacques Marilyn Ambroise Durham, NC	Tracey Bramhall Monroe, NC	Brian Charles Cholewa Raleigh, NC	Sarah Dixon Charlotte, NC	Georgeanna Marie Gardner Raleigh, NC
Adeola Opeoluwa Ashiru Raleigh, NC	Ira Braswell Louisburg, NC	Thomas Benjamin Clark Charlotte, NC	Christopher John Dobranski Charlotte, NC	Carla Louise Gartrell Willow Spring, NC
John Richard Astle Conway, SC	Edward Breitschwerdt Columbus, OH	John Matthew Collins Wilmington, NC	Allison Williams Dobson Durham, NC	Mary Anne Garvey Winston-Salem, NC
Adam Loren Baker Nashville, NC	Rachel Britt Oliver Springs, TN	Kenneth Connor Leesburg, VA	Margaret McCaffrey Doyle Charlotte, NC	Alice Manning Gavigan Charlotte, NC
Elizabeth Blackmore Barber Chapel Hill, NC	Brittany Brock Hickory, NC	Daniel Conrad Durham, NC	Marco E. Duque North Hollywood, CA	John Michael Genest Durham, NC
Stephanie Marie Barfield Charlotte, NC	Edwin Buckley Prescott, AZ	Thomas Corey Charlotte, NC	Christopher Robert Eakin High Point, NC	Meghan Dal Getty Southern Pines, NC
Matthew Kirkland Bass Nashville, NC	Haley Burton Charlotte, NC	Emiliano Corral Chapel Hill, NC	Ashley Austin Edwards Charlotte, NC	Jamie Susanne Getty Lewisville, NC
James Bateman III Richlands, NC	Catina Annette Cain Raleigh, NC	Jennifer Lee Cory Charlotte, NC	David Wyatt Elliott Raleigh, NC	William Gibbs Henderson, NC
John Mark Bauserman Chapel Hill, NC	Jazmin Gabrielle Caldwell Charlotte, NC	Matthew Coury Chapel Hill, NC	Lisa Diana Epperly Charlotte, NC	Lyndsey Jewell Gibson Durham, NC
Kate Ann Beardsley Carolina Beach, NC	Christina Diane Call Asheville, NC	Daniel Covas Winston-Salem, NC	Tracey Renee Evans Charlotte, NC	Lauren Glazier Charlotte, NC
Sondra Beeson Raleigh, NC	Dana Christy Campbell Clayton, NC	Candice Alicia Crawford Raleigh, NC	Corwin DeLeon Eversley Durham, NC	Camille Godwin Lovettsville, VA
Kristen Jai-Mil Bell Greensboro, NC	Sherry Cantrell Charlotte, NC	Jessica Crouse Leeds, NY	Cynthia Everson Gastonia, NC	Anthony Goldman Columbia, SC
Tina Leilani Bernardoni Durham, NC	Crystal Carlisle Grand Haven, MI	David Matthew Curcio Matthews, NC	Stephanie Fabricius Mebane, NC	Robert Lee Gordie Jr. Statesville, NC
Claudia Hoover Bingham Garner, NC	Charles Austin Carroll New Bern, NC	James Cyrus Durham, NC	Eric Farr Eldred, PA	Dmitri Goubarkov Newberry, FL
Elizabeth Blackwood Charlotte, NC	Baccubus Carver Lillington, NC	Danny Haynes Dallas Jr. Reidsville, NC	Michael M. Fedak Laurinburg, NC	Charles Gowland Tallahassee, FL
Marjorie Griffin Blaney Carolina Shores, NC	Patrick John Casstevens Mount Airy, NC	DeLisa Levette Daniels Greensboro, NC	Jennifer Felts Charlotte, NC	Frank Richard Graham Charlotte, NC
Kerin Louise Bligen Charlotte, NC	Tasha Auton Caulder Conover, NC	Elizabeth Carlene Dantism Charlotte, NC	Michael Fitzpatrick Greenville, NC	Kimberly Dawn Grande Raleigh, NC
King Blue III Racford, NC	Tina Marie Cecil Raleigh, NC	Jonathan Blake Davis Candler, NC	Jennifer Mink Fleeman Athens, GA	Jordan Grant Wauseon, OH
	Valerie Grey Chaffin	Ashley Nicole Davis Charlotte, NC	Paul Foley	Laura Gray Wilmington, NC

Anthony Lavell Green Raleigh, NC	Rebecca Jaffe Los Angeles, CA	Nicholas Mancine Concord, NC	Joseph Nelson Chicago, IL	Chapel Hill, NC
Megan Rene Greene Kernersville, NC	Ruth Leanor Jaimes Charlotte, NC	Angela Manz Virginia Beach, VA	Jessica Elaine Nelson Charlotte, NC	Sarah Raynes Chapel Hill, NC
Casen Gregg Charleston, SC	Pamela Jermyn-Kaley Cary, NC	Kalita Denise Marsh Smithfield, NC	Andrew Thomas Nettlesman Wilmington, NC	Lauren Victoria Reeves Raleigh, NC
Roberto Guzman Morrisville, NC	Zachary Jett Charlotte, NC	Harry Clayton Marsh Franklin, OH	Kenneth Scott Newton Raleigh, NC	Ryan Reimers Charlotte, NC
Adam Hall Mt. Ulla, NC	Kwangchul Ji Seoul, South Korea	Whitney Marshall Wilmington, NC	Alexander Nicely Chapel Hill, NC	Stephanie Diane Render Charlotte, NC
Kenneth Slocumb Hall Lexington, NC	Lamont Sanford Johnson Durham, NC	Jonathon Adam Martin Chapel Hill, NC	Caroline Nickel Cary, NC	Keith Edward Richardson Raleigh, NC
Julie Denise Hall Hillsborough, NC	Ann-Rose Marie Johnson-Lewis Huntersville, NC	Joseph A Martinez Valdese, NC	Gina Marie Nilson Spring Lake, NC	Lori Richmond-Gershon Chapel Hill, NC
Christopher Hall Charlotte, NC	Cheryl M. Samuel Jones Charlotte, NC	Jeffrey Stewart Marvin Durham, NC	Bryant Anthony Norman Raleigh, NC	Benjamin Richter Durham, NC
Duane Hall II Cocoa, FL	Meredith J Jones Holly Ridge, NC	Carmen Joseph Marzella Cary, NC	James Michael O'Dell Kitty Hawk, NC	Donald Cameron Ringer III Winston-Salem, NC
A. Scott Hamilton Durham, NC	Eugene Joseph Joslyn Jr. Cary, NC	Alan Matavich Youngstown, OH	Shannon Lee O'Donnell Greensboro, NC	Sherry Leigh Risley Durham, NC
Merissa Dyan Hannah Charlotte, NC	Cheryl Junker Raleigh, NC	LaShonda Renea Maxfield Charlotte, NC	Michele Nneka Okoh-Bernis Raleigh, NC	David Ellis Roberts Greensboro, NC
John Harrington Charlotte, NC	Matthew Wayne Keene Pinnacle, NC	Kevin Maxwell Arlington, VA	Yoko Onishi Yokohama, Japan	Tanisha LaShawn Robertson Fayetteville, NC
Yolonda Patrice Harrison Newark, NJ	James Charles Keister Goldsboro, NC	Jack Russel McCaffery III Charlotte, NC	Deirdre Ordning Hampstead, NC	Leslie Robinson Ypsilanti, MI
Nichelle Nicole Harrison Greensboro, NC	Rhonda Baker Kelley Durham, NC	Carrie Lynne McCann Raleigh, NC	Mehmet Turhan Ovacik Hendersonville, NC	Aaron Riley Rucker Fort Mill, SC
James Hart Cary, NC	Katherine Thomas Kelly Charlotte, NC	Katherine McClain Charlotte, NC	Dawn Marie Oxendine Wilmington, NC	Bryan Sanchez Charlotte, NC
Todd David Hastings Wilmington, NC	Stephanie Kennedy Charlotte, NC	Maureen Rose McDonald Charlotte, NC	Cassandra Mae Painter North Myrtle Beach, SC	Armene Amy Sarkissian Durham, NC
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Lisa Hennessy Greenville, NC	Jean Kim Asheville, NC	Neal McHenry New Orleans, LA	Hassan Shabazz Parrish Shelby, NC	Lara Say Concord, NC
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Eric Hepler Ashburn, VA	Benjamin Edward Klein Greensboro, NC	Jessica Molly McKenzie Wilmington, NC	Neal Ashvin Patel Huntersville, NC	Brian Schaefer Chapel Hill, NC
Jeffrey Hester Clover, SC	Nathaniel Knust Rockledge, FL	Wendy McNeil Charlotte, NC	Christopher Lee Peebles Winston-Salem, NC	Carey Jeanne Scheible Winston-Salem, NC
Edward Lee Hicks Winston-Salem, NC	Pedro Koe-Krompecher Chicago, IL	Maryam Monfared Mehrabani Raleigh, NC	Robert C. Peithman Columbia, SC	Melanie Scherer Charlotte, NC
Christopher Hicks Benson, NC	Erin Kuenzig Pompano Beach, FL	Timothy M. Melton Wake Forest, NC	Katherine Heath Pekman Winston-Salem, NC	Gary Evan Schuler Charlotte, NC
Tate Hodges Wilmington, NC	Lucas Kurtz Charlotte, NC	Justin Mettlach Brooklyn, NY	Jaime Perritt Virginia Beach, VA	Sheri Lee Schwab Durham, NC
Jessica Nicole Holmes Chapel Hill, NC	Leah Landerman Durham, NC	Laura Meyer Cary, NC	Terry Gregory Perry Morganton, NC	George Scott Lexington, SC
Philip Holroyd Raleigh, NC	John Landreth Matthews, NC	John Mihelick Canton, MI	Joshua Ryan Pinyan Salisbury, NC	Brittany Scott Greenville, SC
Kevin Hope Belmont, NC	Ruth Lang Matthews, NC	Chad Richard Miller Charlotte, NC	Loucinda Pittenger Charlotte, NC	Falls Seagrave Charlotte, NC
Ellen Inocencia Houseal Clarkton, NC	Jennifer Lawson Johnson City, TN	David Edward Miller III Durham, NC	John Bradford Pittman Durham, NC	Jean Renee' Seels Indian Trail, NC
Nycole Robinson Howard Burnsville, NC	Seung-Hyun Lee Goyang City, South Korea	Samuel Earl Mills Raleigh, NC	Stephanie Stark Poling Burnsville, NC	Laura Renee Seidman Parkland, FL
Kristi Huff Raleigh, NC	Jeeyoun Lee Raleigh, NC	Christi Misocky Charlotte, NC	Norman Charles Post III Charlotte, NC	Seema Prakash Shah Jamestown, NC
Meredith Hulin Charlotte, NC	Matthew Terrence Lee Asheville, NC	Lisa Laney Moorehead Charlotte, NC	Brian Douglas Powell Chapel Hill, NC	Stephen Ryan Shortt Charlotte, NC
Ryan Hurley Warwick, RI	Nathan Letts Chapel Hill, NC	Jamilah Malika Morris Raleigh, NC	Eric Miles Pratt Durham, NC	Katharine Yvonne Shuster Charlotte, NC
Thua Huynh Jr. Due West, SC	Jeffrey Phillip Lewis Greensboro, NC	Christina LaVon Murray Durham, NC	Elysia Prendergast Raleigh, NC	Jerome Simmons Rolesville, NC
Samuel Richard Iden Wake Forest, NC	Patricia Lewis Charlotte, NC	Stephanie Nachtrieb Cary, NC	Amber Marie Price Clemson, SC	David Simmons Winston-Salem, NC
Charles Marshall Ivey IV Greensboro, NC	LaTonya Michelle Lipscomb Durham, NC	Chaudary Husain Najmi Alexandria, VA	Sarah Privette APO, NY	Lauren Sindelar Charlotte, NC
Andrew Craig Jackson Jr Todd, NC	Jennifer Loheac Chester, NJ	Amy Murphy Navejas Lillington, NC	Rasha Qumsiyeh Fayetteville, NC	LaVerne W. Singleton II Raleigh, NC
			Thomas Rardin	Mark Skanes Ballston Spa, NY

Jeffery Smith Charleston, SC	Erica Elizabeth Stauffer Kapolei, HI	Donald Torino Durham, NC	Candace T. Walton Charlotte, NC	LaRhonda Nicole Williams Durham, NC
Chad Rollon Smith Bryson City, NC	Jeffrey Barnes Stephenson Jr. Chapel Hill, NC	Jorge Torres Huntersville, NC	Hongjing Wang Tokyo, Japan	Jonathan Wilson Kernersville, NC
Matthew Smith Clayton, NC	Eva Grace Steward Arden, NC	Amy Michelle Townsend Pleasant Garden, NC	Gina Kathleen Warakois Waxhaw, NC	Caroline Ann Wingate Waxhaw, NC
Stephen Smith Fort Mill, SC	Jordan Garrett Stewart Stedman, NC	Mark Townsend Jr. San Juan Capistrano, CA	Lewis Watson Miami, FL	Christina Marie Wood Cary, NC
Rudolph Kevin Smith Fayetteville, NC	Anna Caylin Stites Chapel Hill, NC	Daphne Trevathan Rocky Mount, NC	Mary Whelpley Wilmington, NC	Nicholas Wood Durham, NC
Benjamin Skardon Smith Saluda, NC	Patrick Thomas Strubbe West Lafayette, IN	Philip Benjamin Trotter Charlotte, NC	Erin Whitcomb Pompano Beach, FL	Keya McAkenzie Worthington
Julie Beth Smith Garland, NC	Christopher Lin Suggs Suffolk, VA	Jeffrey Truitt Garner, NC	Charles Whorton Miami Beach, FL	Greensboro, NC
Tracey Snipes Fayetteville, NC	Kindra Anne Taplin Charlotte, NC	Anthony Richard Tuorto Cary, NC	Charles Tyler Wichmann Charlotte, NC	Jarranis Lumumba Yates Rock Hill, SC
Ross Stuart Sohm Charlotte, NC	Saretta Tatum Charlotte, NC	Ryan Jacob Velderman Winston-Salem, NC	Memminger Edward Wiggins Waxhaw, NC	Paula Janelle Yost Charlotte, NC
Ali Alexander Solhi Cypress, CA	Justin Ryan Taylor Raleigh, NC	Lakai Vinson Richmond, VA	Tammy Wiggins Pikeville, NC	Joanna Haiyoung Yu Durham, NC
Christopher Leonard Spinelli Chesapeake, VA	Richard Paul Theokas Shelby, NC	Alexander Francis Vitale Naples, FL	Eric Williams Cary, NC	Kelli Brigida Zappas Pittsburgh, PA
Tiffany Bowers Stark Greenville, NC	Preston Nathaniel Thomas Concord, NC	Ursula Lee Walder Winston Salem, NC	Carolyn Anne Williams Asheville, NC	

Annual Reports (cont.)

made, or the client contacted and offered assistance, with the result that it was determined that no further action was needed on the client's behalf; and (2) cases that were investigated, the investigation was inconclusive as to the need for assistance, and the case was closed after two years when there did not appear any new information that help was needed. The success category does not include lawyers who died, went on disability status, were disbarred, or moved out of state. Although these categories reflect elimination of potential harm to the public, they do not show that a lawyer was actually helped. We regard outcomes as unsuccessful where a contract was entered into and the client failed in his or her efforts to achieve recovery, where a client went to treatment and left treatment and did not pursue recovery, and cases where it was unsuitable for the LAP to provide assistance.

Since 2000, there have been 915 active case files closed. Of these closed cases, 518 were for addiction issues and 397 for mental health. Of files closed this past year, for addiction cases there is a success rate of 86%, and for the mental health a success rate of 83%.

The LAP is currently handling 575 files. There are 259 PALS and 316 FRIENDS files.

PALS Referrals:	FRIENDS Referrals:
Other Lawyer 69	Other Lawyer 64
Bar Staff 12	Bar Staff 27
Self 94	Self 171

Physician 1	Physician 1
Local Bar 1	Local Bar 2
Judge 15	Judge 6
Grievance 11	Grievance 14
Nonlawyer 5	Nonlawyer 6
Firm 17	Firm 11
Family 13	Family 3
DHC 2	DHC 4
DA 2	DA 0
BOLE 9	BOLE 0
Bar Examiner 1	Bar Examiner 1
EAP 0	EAP 1
Investigators 0	Investigators 2
Another LAP 2	Another LAP 2
Therapist 2	Therapist 1
Unknown 3	Unknown 0

Governance

Under the rules of the NC State Bar Council, the LAP is governed by a nine member board. The NC State Bar Council appoints the members of the Lawyer Assistance Program Board in three different groups: three councilors of the NC State Bar; three persons with experience and training in the fields of mental health, substance abuse, and addiction; and three Bar members who currently serve as volunteers to the LAP. In order to avoid any perception that the LAP Program is not entirely separate from the disciplinary functions of the State Bar, no member of the Grievance Committee may serve on the LAP Board.

The current members of the LAP Board are: Mark W. Merritt, chair and a councilor; Fred F.

Williams, vice-chair, LAP and volunteer; Sheryl T. Friedrichs, volunteer; Paul A. Kohut, volunteer; David W. Long, councilor; Margaret J. McCreary, councilor. Burley B. Mitchell Jr., Dr. Al Mooney, and Professor Barbara Scarboro serve in the three expertise seats.

Staff

There were no changes in the LAP's professional staff during the year: Don Carroll, director; Ed Ward, assistant director; Towanda Garner, piedmont coordinator.

During the year the LAP saw the retirement of senior administrative assistant Betty Whitley. Joan Renken has replaced Betty in the Raleigh LAP office.

Applications and use of the LAP's confidential data base were upgraded during 2009.

2010 LAP Board Meeting Schedule

The LAP Board meets quarterly during the time of the council meetings except in the fall, when the LAP Board meets, if necessary, at the time of the Annual PALS Meeting and Workshop.

LAP Board meetings are usually scheduled for lunchtime on Wednesday of the week the council meets. The 2010 schedule for the council is listed below:

January 19-22, 2010
Marriott Raleigh City Center, Raleigh
April 20-23, 2010
Marriott Raleigh City Center, Raleigh
July 20-23, 2010
Carolina Hotel, Pinehurst, NC ■



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The State Bar certifies attorneys as specialists in the following areas:

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- Elder Law
- Estate Planning and Probate Law
- Family Law
- Immigration Law
- Real Property Law
- Social Security Disability Law
- Workers' Compensation Law

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